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Supreme Court U.S
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No.

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,
PETITIONER

v.

CITY OF ST. PETERSBURG, FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of St. Petersburg, Florida requires that a city permit be obtained before residents, businesses, or organizations can post a sign, fly a flag, hang a banner or pennant, or even place a poster in their window. Pursuant to the City's regulations, officials are free to delay responding to all such applications for an indefinite time. Based upon a misreading of this Court's *Thomas v. Chicago Park District* decision, the Eleventh Circuit Court of Appeals held that it is permissible for government officials to have such power over fundamental speech activity.

1. Whether a government entity can restrain fundamental and protected speech for an indefinite period of time merely by using a permitting scheme that is deemed content-neutral?

2. Whether the Court intended in *Thomas v. Chicago Park District* to overturn the holdings from *Riley v. National Federation of the Blind* and *FW/PBS v. Dallas* that even content-neutral speech permitting schemes must include some procedural safeguards?

CORPORATE DISCLOSURE STATEMENT

Petitioner Granite State Outdoor Advertising, Inc. has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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OPINIONS BELOW

The opinion of the three-judge panel of the Eleventh Circuit Court of Appeals is reported as Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003).[1] The opinion and judgment of the district court are unreported.

JURISDICTION

The court of appeals issued its decision on October 28, 2003. A petition for rehearing and hearing en banc was denied on December 28, 2003. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction in the Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

Section 1983 of Title 42 of the United States Code states that any person that "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

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[1] The Appendix attached hereto includes the circuit court decision (1a-12a), district court order (13a-62a), and judgment (63a).

injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

I. OVERVIEW OF THE CASE

Petitioner asserted in the district court that the St. Petersburg sign regulations were invalid because, *inter alia*, they lacked any procedural safeguards. (49a). City officials were never required to grant or deny sign applications. (3a, 18a). The district court held the regulations unconstitutional because no time limits constrained City officials. (50a-51a).

The Eleventh Circuit panel reversed holding that the City's sign permitting scheme did not need to contain any requirement that officials act on an application within any definite period of time. (4a, 7a). The court found that the regulations, after certain provisions were severed, were viewpoint neutral. (4a, 6a). Based solely upon a misreading of this Court's decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), the court of appeals held that content-neutral speech restrictions need not include any procedural safeguards. (6a). This determination is actually contrary to the Court's holding in *Thomas*, and also violates the clear holdings in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Certain language utilized in the *Thomas* decision, however, has led several other courts, including three courts of appeal, to also find that it overturned *FW/PBS* and *Riley*.

II. FACTUAL BACKGROUND OF THE CASE

The City of St. Petersburg, Florida, limits the placement, number, size, height, design, operation, maintenance, and content of signs, and other visual displays, such as flags and banners, through a comprehensive sign permitting scheme. (2a, 15a-19a). To post a sign, a person or organization must first receive permission from the City by engaging in the City's permitting procedures. (3a, 18a). Without express permission from the City, no one can post a sign that is governed by the comprehensive sign regulations. (3a).

Under that scheme, the City is never required to pass judgment on an application to post a sign. (3a. 18a). As the court of appeals acknowledged, the scheme "does not require the City to process an application within any certain amount of time." (3a). Instead, the scheme contains no procedural safeguards to ensure that the City's discretion is controlled, or even that the City must act on properly submitted sign applications.

Petitioner Granite State Outdoor Advertising was subjected to the permitting scheme in its effort to post signs in the City. (3a, 19a). It brought this action to challenge the constitutional validity of the City's sign regulations.

III. PROCEEDINGS BELOW

The district court held that the St. Petersburg scheme was unconstitutional in its entirety because it contained no requirement that the City act on a permit application within any determinate period of time.

(51a). The City appealed this finding to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit overturned the district court's holding and reinstated the City's sign ordinance. (4a, 8a). In particular, the panel held that the fact that there were no procedural safeguards constraining the processing of sign applications by City officials was not a defect of the ordinance. (8a) ("the lack of time limits in constitutionally acceptable"). The panel based its holding solely on the Court's decision in *Thomas*, reading that opinion to eliminate the need for procedural safeguards in speech permitting schemes as long as those schemes can be deemed "content-neutral." (5a-6a). The holding is in conflict with *Thomas* itself, as well as with *FW/PBS* and *Riley*. The holding is also in conflict with other circuit courts that have examined the same issue.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ."

In this case, the petition should be granted under all of Rule 10's criteria set forth above. In particular, the court of appeals decision countenances a speech permitting scheme that only allows speech when the City approves it, and then at the same time allows the City to indefinitely refuse to act on applications for permission to speak. The panel opinion reversed the presumptions of *Thomas*, so that instead of speech being allowed unless a proper reason for denial is set forth within a limited time, the presumption is that speech can be eliminated merely through inaction, without any requirement that a government permitting scheme must contain limits on its own discretion.

The *Granite State* opinion directly conflicts with the Court's decisions on this issue, and it also conflicts with decisions of at least four other court of appeals panels. Nevertheless, the mistaken logic underlying the decision is obviously quite persuasive, because several other courts have also now held that *Thomas* did indeed do away with all need for safeguards in content-neutral speech permitting schemes. This Petition should therefore be granted.

I. Review is Warranted because the Panel Decision Conflicts with the Court's Holdings in *Thomas*, *FW/PBS*, and *Riley*.

A. The *Granite State* Decision is a Misapplication of *Thomas*

Although the *Granite State* court admitted that "City officials could potentially delay the processing of certain permit applications and thereby suppress disfavored speech," (7a), it nonetheless excused this failure because it erroneously held that the Court's decision in *Thomas* eliminated the requirement that government entities have procedural safeguards to limit official discretion and ensure judicial review of decisions made under purportedly "content-neutral" speech regulations. (6a-7a).

Thomas held no such thing. *Thomas* held: "We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas* at 323 (citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)). That holding is consistent with numerous other unambiguous holdings of the Court, showing that in any speech regulatory scheme, the essential protection is against an exercise of governmental discretion that need not be articulated and cannot be reviewed. *E.g.*, *FW/PBS* and *Riley*. *Thomas* was a straightforward reiteration of this necessary rule.

As the Court noted in *Thomas*, the City of Chicago had at most 28 days to act on a permit application for use of a city park, and the application could be denied only for one of thirteen enumerated reasons. *Id.* at 324 ("the Park District must process

applications within 28 days"); *also id.* at 319 ("the Park District must decide whether to grant or deny the application within 14 days unless, by written notice to the applicant, it extends the period an additional 14 days"). Next, there is the "appeal to the General Superintendent" who "must act on the appeal within seven days." *Id.* at 319, 324. Finally, the applicant could appeal a denial by writ of certiorari to state court. *Id.* at 319, 324. These facts put the Chicago park use application program squarely in the mainstream of speech permitting programs, and thus provided no basis for a constitutional challenge. In this case, none of these protections are present because there is no requirement that the City of St. Petersburg act on a permit application at all, let alone in the 28 days of *Thomas*. In essence, because Chicago's ordinance had time limits for each phase of the permitting process, the dispute on appeal to the Court was limited to the third *Freedman* safeguard. The *Thomas* Court even framed the issue: "Petitioners contend that the Park District, like the Board of Censors in *Freedman*, must initiate litigation every time it denies a permit and that the ordinance must specify a deadline for judicial review of a challenge to a permit denial." 534 U.S. at 322.

The crux of the panel's misreading of *Thomas* is its false presumption that the speech regulated here could go forward unless the City itself took action to stop it. (7a). From this faulty understanding of *Thomas*, the panel goes on to hold that no restrictions on the City's permitting scheme are necessary. (8a).

The fundamental flaw in this reasoning is apparent, as is its departure from the holding of *Thomas*. The City's sign permitting scheme prohibits all signs absent an exception contained in the scheme, and no sign can be posted absent express permission

from the City. (3a, 18a). Given this order of presumptions, no speech can go forward absent permission. That is the opposite of the presumption required under the reasoning of the panel, and this reversal of presumptions led the panel to an incorrect interpretation of the state of the law as it relates to speech permitting regulatory schemes.

Thomas and the cases leading up to it eliminate this problem by requiring procedural safeguards, such as limits on time for decision and the need for effective judicial review, in any speech permitting scheme. The need for these safeguards is apparent; absent them, a government entity can indefinitely prohibit speech without stating its reasons, thus both eliminating the speech itself and eliminating the possibility for effective judicial review. This result is patently incorrect under years of precedent.

Yet the *Granite State* decision is willing to countenance this result that is contrary to the reasoning of *Thomas* and the cases that came before it. Under the panel's holding, a government entity could refuse to grant or deny a permit application, exercising an unconstitutional pocket veto over the application without stating its reasons and without holding the application up to the supposedly content-neutral standards contained in the permitting scheme. That result would allow the government permitting entity to pick and choose among speakers and methods of speech without any effective constraints. Such a result is wrong, pernicious, and ripe for review by the Court.

The Court should grant this Petition so that it can make clear that *Thomas* has not eliminated the requirement that procedural safeguards be in place in a time, place, and manner restriction on speech. The *Granite State* panel's holding to the contrary is wrong.

B. The *Granite State* Decision is Contrary to *FW/PBS* and *Riley*.

The rationale that underlies *Thomas* has been set forth by the Court in numerous previous cases. Most concisely, the Court held in *Riley* that a content-neutral "time, place, and manner restriction . . . must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" *Riley*, 487 U.S. at 802 (quoting *Freedman v. State of Maryland*, 380 U.S. 51, 59 (1965)). In *Riley*, the Court reviewed North Carolina's licensing requirements for professional fundraisers, *id.* at 801-02, and found that, although the regulations were not at all based upon content, time limits had to be in place to ensure prompt action. *Id.* at 802.

In *FW/PBS*, the Court held that even where permit or license schemes do "not present the grave 'dangers of a censorship system'" some, but not all, of the *Freedman* safeguards must be in place. 493 U.S. at 228-30. The Court emphasized that Dallas' content-neutral permitting mechanism for adult entertainment establishments was markedly different from Maryland's censorship board:

> Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.

Id. at 229. Based upon these differences, Justice O'Connor's wrote:

> that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks."

Id. at 230. Three justices – Brennan, Marshall, and Blackmun – concurred in the judgment but vociferously objected to Justice O'Connor's opinion in as much as it removed the third *Freedman* safeguard for content-neutral licensing schemes. *Id.* at 238-42. The concurring justices argued that the matter had been settled by the *Riley* decision:

> Two Terms ago, in *Riley*, this Court applied *Freedman* to a professional licensing scheme because the professionals involved, charity fundraisers, were engaged in First Amendment-protected activity. We held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, it "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" [cites omitted] The North Carolina statute did not so

> provide, and we struck it down. [cite omiteed] In *Riley*, this Court, to be sure, discussed the failure of the North Carolina statute to set a time limit for actions on license applications, but it also held that the *licensor* must be required to go to court, not the would-be fundraiser. Because I see no relevant difference between the fundraisers in *Riley* and the bookstores and motion picture theaters in these cases, I would hold that the city of Dallas must bear the burden of going to court . . . .

Id. at 240. Although the *FW/PBS* decision left some doubt as to the status of *Freedman*'s third safeguard, there could be no doubt that, whenever speech activity is subject to a license or permit, the first two safeguards must be in place. In other words, whether a regulation is content-based or is merely a time, place, and manner restriction, the speech restriction must require government officials to grant or deny the application within a specific and brief time frame and provide for expeditious appeal procedures.

Thomas did nothing to overrule this basic rule of law regarding speech permitting schemes. Instead, *Thomas* reaffirmed this important restriction on speech permitting schemes, making clear that a government entity must act within a short and specified period of time when it prohibits speech absent permission under its licensing scheme.

The *Granite State* decision ignored this important restriction on government elimination of certain methods of protected speech. This holding is contrary to almost 25 years of express precedent to the

contrary. The Court should grant this Petition to resolve this error.

II. The *Granite State* Decision Creates Confusion Among the Circuits on this Important Question of Federal Law.

The *Granite State* decision is in direct conflict with decisions of several other circuit court panels that have considered this precise issue in the context of restrictions on First Amendment activity. Other courts have made the same mistake as the *Granite State* panel, however, by misreading *Thomas* to remove all safeguards from content-neutral speech restrictions. This important question of federal law requires uniformity because to permit otherwise would countenance a situation where speakers in some parts of the country would be denied the exact same speech rights they are guaranteed in other parts of the country.

The *Granite State* decision conflicts with the following decisions: *Southworth v. Board of Regents*, 307 F.3d 566, 589 (7th Cir. 2002) (finding that *Thomas* Court "relied on the fact that the ordinance included a deadline for processing applications . . . and provided for an appeal of the decision to the General Superintendent of the Park District"); *Encore Videos, Inc. v. San Antonio*, 330 F.3d 288, 296 n.12 (5th Cir. 2002) (invalidating time, place, and manner restriction without safeguards and stating that "[t]he relevance of *FW/PBS* is not affected by *Thomas*"); *Z.J. Gifts D-4, L.L.C. v. Littleton*, 311 F.3d 1220, 1237 (10th Cir. 2002) (*Thomas* did not overrule prior decisions requiring time limits on governmental speech permitting schemes), *cert. granted in part*, __S.Ct. __, 2003 WL 21134039

(Oct. 14, 2003) (addressing the issue of whether judicial review must be completed or merely available within a brief period); *Fly Fish, Inc. v. Cocoa Beach*, 337 F.3d 1301, 1308, 1314 (11th Cir. 2003) (invalidating permitting scheme that "gives the City an unlimited length of time to make the application decision" even though regulation could "properly be characterized as a time, place, and manner regulation"). These cases recognize the very limited impact that *Thomas* had on the law of procedural safeguards.

Other courts of appeal have read *Thomas* – as did the *Granite State* court – to have done away with safeguard requirements for content-neutral speech permitting schemes. In *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (D.C.Cir. 2002), the court of appeals found:

> Few cases invoke the requirement for procedural safeguards unless an explicit censorship scheme – which by definition is not content-neutral – is under attack, and the Supreme Court recently has confirmed that the procedural safeguards doctrine is so limited in scope. *See Thomas*, [cite omitted] (holding that content-neutral regulations need not satisfy *Freedman's* requirement for procedural safeguards).

Id. at 1328; *also New England Reg. Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002 (finding that "procedural requirements do not apply to permit schemes that eschew any consideration of the content of speech"); *Granite State Outdoor Adver., Inc. v. Clearwater*, 351 F.3d 1112, 1118 (11th Cir. 2003)

(holding time limits "are not categorically required when the permitting scheme is content-neutral").[2]

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[2] District courts are also divided on the issue. Some have recognized that *Thomas* did not do away with safeguards for content-neutral speech restrictions. *E.g.*, *Diener v. Reed*, 232 F. Supp. 2d 362, 377-79 (M.D.Penn. 2002) (emphasizing that *Thomas* would have reached the opposite conclusion if no safeguards had been in place that Court did not remove all safeguard requirements from even content-neutral ordinances: "In *Thomas*, the Supreme Court decided that a content-neutral regulation, like the one at issue here, did not have to comply with *Freedman*'s procedural requirement of prompt judicial review"); *Horizon Outdoor, L.L.C. v. City of Industry*, 228 F. Supp. 2d 1113, 1128 (C.D.Cal. 2002) ("The licensing scheme must provide some safeguards . . . . Defendant's reliance on the Supreme Court's recent decision in *Thomas* is inexplicable. The ordinance at issue in *Thomas* included the necessary *Freedman* safeguards"); *Pro-Life Cougars v. University of Houston*, 259 F. Supp. 2d 575, 583 (S.D.Tex. 2003) (describing *Thomas* as "holding that while the challenged ordinance constituted a prior restraint, it was nevertheless constitutional because it contained adequate procedural safeguards and objective standards"); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1028 n. 9 (C.D.Cal. 2002) (finding that "*Thomas* Court addressed a content-neutral permit scheme regulating speech in a public forum" and recognizing that "[t]he holding in *Thomas* is more limited than Defendant suggests"); *Metropolis of Connecticut, LLC v. Fleming*, 2002 WL 1359688, *6 (D.Conn. 2002) (invalidating content-neutral state licensing scheme because it failed to "provide for a time frame for a decision on the application"). Other district courts have understood *Thomas* as removing the requirement of safeguards from content-neutral ordinances. *Lamar Adver. Co. v. Douglasville*, 254 F. Supp. 2d 1321, 1327, 1333-34 (N.D.Ga. 2003) (holding that Thomas removed safeguard requirements where sign "permitting scheme . . . intended to be a content-neutral time, place, and manner restriction"); *National Adver. Co. v. Miami*, 287 F. Supp. 2d 1349, 1377-78 (S.D.Fla. 2003); *B&B Coastal Enters., Inc. v. Demers*, 276 F. Supp. 2d 155, 168 (D.Me. 2003) (finding that *Thomas* held that safeguard requirements "do not apply to a

These decisions make clear that courts will continue to find that *Thomas* put an end to procedural safeguards for content-neutral speech permitting schemes unless the Court grants this Petition.

The fundamental conflict is clear between these decisions. Most courts have endeavored to ensure that official discretion is not abused by requiring the government to act within a specified period when evaluating speech applications. *Granite State* and the similar decisions have eliminated this protection. Limitation of speech by the government is always an important federal question; elimination of the right to receive a ruling and if needed seek judicial review when speech is subject to a permitting scheme is a judicial elimination of one of the fundamental protections against governmental abuse of speech rights. The *Granite State* panel and others have decided to eliminate that protection based upon a misreading of *Thomas*. This Petition should be granted to resolve this glaring conflict between the courts.

CONCLUSION

This Petition for Writ of Certiorari should be granted. The *Granite State* panel's ruling on this basic question of federal law conflicts with the holdings of the Court, with those of other circuit courts around the country, and with common sense. The *Granite State* court is not alone in its belief that *Thomas* removed all safeguard requirements from content-neutral speech

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permit or licensing scheme that does not condition expression on a licensing body's approval of content").

restrictions, however, as at least three courts of appeals have now adopted this interpretation. This conflict is amenable to ready clarification by the Court. The Court should take this opportunity to clarify its intent in *Thomas* because the right of free speech above all others requires uniformity and diligent protection.

DATED this 29th day of March, 2004.

Respectfully submitted,
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(Any footnotes trail the end of each document)

No. 02-16433

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GRANITE STATE OUTDOOR ADVERTISING, INC.,
Plaintiff-Appellant-Cross-Appellee,

versus

CITY OF ST. PETERSBURG, FLORIDA,
Defendant-Appellee-Cross-Appellant.

October 28, 2003, Decided
October 28, 2003, Filed

COUNSEL: For Granite State Outdoor Advertising, Inc., Appellant: Webb, Edward Adam, Dow, Lohnes & Albertson, Atlanta, GA.

For City of St. Petersburg, Florida, Appellee: Morris, Shauna F., City of St. Petersburg, Florida, Legal Department, St. Petersburg, FL.

JUDGES: Before BLACK and FAY, Circuit Judges, and HUCK *, District Judge.

OPINIONBY: BLACK

OPINION: BLACK, Circuit Judge:

After its permit applications were denied, Granite State Outdoor Advertising, Inc. (Granite) filed suit seeking to compel the City of St. Petersburg (City) to allow Granite to erect six billboards inside the City's limits. We must decide whether the First Amendment requires a content-neutral municipal sign ordinance to expressly limit the amount of time a municipality may take to process a permit application. The district court found the complete absence of time limits necessitated the invalidation of the City's sign ordinance. On this issue alone, we reverse and hold time limits are not per se required. Accordingly, the City is entitled to summary judgment, and neither damages nor attorneys' fees are appropriate.

I. BACKGROUND

Like many other municipalities, the City has an ordinance to regulate the appearance, location, and number of signs within its boundaries. ST. PETERSBURG, FLA., CODE §§ 16-666-713. In part, this sign ordinance restricts the placement of off-premise signs. An off-premise sign is defined as any sign that "identifies or advertises a product, business, person, activity, condition, or service not located or available on the same zone lot where the sign is installed and maintained." Id. § 16-666(16).

The sign ordinance regulates off-premise signs in several noteworthy ways. First, an off-premise sign is permitted only on a lot zoned commercial/industrial. Id. § 16-671(3). Second, an off-premise sign is permitted on a lot only if there are no other structures there. Id. § 16-710(1)(f)(1). Third, only one off-premise sign is permitted per lot. Id. Fourth, each off-premise sign

must comply with the height, area, separation, and setback requirements set forth in the sign ordinance. Id. § 16-710(1)(f)(4)-(7). Finally, a sign permit is required. Id. § 16-692.

To obtain a sign permit, an applicant must submit a sign plan demonstrating that the proposed sign complies with the sign ordinance. Id. § 16-692(e). The ordinance, however, does not require the City to process an application within any certain amount of time.

Granite acquired signed lease agreements authorizing it to construct and operate billboard signs on six different parcels of real property within the City. Granite then applied to the City for the necessary sign permits. Seventeen days later, the City informed Granite all of its applications had been rejected because (1) other structures already existed on the lots, and (2) Granite failed to demonstrate compliance with the height, separation, and setback requirements. The City further informed Granite that one of its six applications also sought to erect an off-premise sign on a lot zoned residential multifamily, and a second failed to demonstrate it met the minimum frontage requirement.

Granite did not administratively appeal the City's denial of its applications. Instead, Granite promptly filed suit claiming the sign ordinance was unconstitutional, both as-applied and facially.

After both parties moved for summary judgment, the district court entered its order, granting in part and denying in part both motions. The district court found (1) Granite's as-applied challenge failed; (2) several provisions of the sign ordinance were unconstitutional

but severable; n1 (3) the sign ordinance's failure to specify any time limits gave City officials undue discretion, was nonseverable, and necessitated the invalidation of the remainder of the ordinance; and (4) Granite was not entitled to damages or attorneys' fees.

After the district court entered judgment for Granite, Granite demanded that the City immediately allow it to erect its six billboards. The City refused and filed a Motion for Clarification and Stay of the Order Pending Appeal. During the motion hearing, the district court stated it was neither requiring the City to issue permits nor ordering it to allow Granite to erect billboards. The district court issued a second written order granting a stay and adopting its oral clarification. The parties appeal and cross-appeal from these two orders.

II. DISCUSSION

We affirm without discussion much of the result reached by the district court. n2 We reverse, however, with respect to whether time limits are required and hold they are not. We also briefly note that both damages and attorneys' fees are inappropriate.

A. Time Limits

Granite argues that the lack of specific time limits confers excessive discretion on City officials, thereby potentially chilling speech before it occurs. The district court found the absence of time limits required it to grant summary judgment for Granite and invalidate the entire ordinance. We review the district court's grant of summary judgment de novo. See Nat'l Fire Ins. Co. v.

Fortune Constr. Co., 320 F.3d 1260, 1267 (11th Cir. 2003).

We begin our analysis by summarizing the two Supreme Court cases that establish the extent to which specific procedural safeguards, such as time limits, are required.

In the first case, Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), the Supreme Court invalidated a content-based state law requiring motion pictures to obtain a license prior to release. Id. at 58, 85 S. Ct. at 738-39. The licensing board had the exclusive discretion to deny a license if it concluded a film was obscene. Id. The Court held such a restraint was only valid if the licensing scheme contained the following specific procedural safeguards:(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;

(2) expeditious judicial review of that decision must be available; and

(3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227, 110 S. Ct. 596, 606, 107 L. Ed. 2d 603 (1990) (citing Freedman, 380 U.S. at 58-60, 85 S. Ct. at 739-40 (emphasis added).

In the second case, Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002), the Court considered a content-neutral permitting scheme. Id. at 320-23, 122 S. Ct. at 778-80. Writing for a unanimous Court, Justice Scalia explained that having

to obtain a permit to hold a public event in a park was quite different from the censorship at issue in Freedman. See id. (noting that the content-neutral regulation of expression was not the type of "core abuse" against which the First Amendment was originally crafted to protect). Accordingly, the Court held the "extraordinary procedural safeguards" required in Freedman were inapplicable. Id. at 323-24, 122 S. Ct. at 780. In particular, even though the ordinance at issue required all permit applications to be processed in 28 days, the Court never stated time limits were per se required for a permitting scheme to be valid. See id. Rather, the Court simply held all that was required were "adequate standards to guide the official's decision and render it subject to judicial review." Id.

Clearly, whether Freedman or Thomas controls here depends on whether the City's sign ordinance is content-based or content-neutral. The government's objective in regulating speech is the controlling consideration. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753-54, 105 L. Ed. 2d 661 (1987). More specifically, if the government's reasons for regulating speech have nothing to do with content, then the regulation is content-neutral. Id.; see also Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992) (stressing that location-based regulation is not content-based regulation).

Here, the ordinance states on its face that it was enacted to (1) promote uniformity, (2) preserve aesthetics, and (3) foster safety. ST. PETERSBURG, FLA., CODE § 16-667(b)(2). In addition, our review of the record does not suggest the sign ordinance

discriminates impermissibly based on content. n3 Thus, we conclude the sign ordinance is content-neutral and Thomas controls.

Accordingly, we are simply required to assess whether the ordinance contains adequate standards to guide official decisionmaking. See Thomas, 534 U.S. at 323-24, 122 S. Ct. at 780. Reviewing the text of the sign ordinance again convinces us that it does. After all, City officials may not exercise unlimited discretion. They can only process permit applications based upon objective criteria set forth in the ordinance. n4 No official is able to reject an application simply because of the proposed content. Moreover, anyone adversely affected by the ordinance may resort to either administrative review or--as Granite has done--the courts.

We realize City officials could potentially delay the processing of certain permit applications and thereby arbitrarily suppress disfavored speech. We will not, however, address hypothetical constitutional violations in the abstract. As the Supreme Court noted in Thomas, we believe "abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." Id. at 325, 122 S. Ct. at 781. Furthermore, we are reluctant to invalidate an entire legitimately-enacted ordinance absent more of a showing it is as problematic as Granite claims. n5

We find additional support for our holding in the decisions of other courts. Significantly, the only other Circuit court to directly consider the issue of time limits post-Thomas also held that the Freedman requirements

were inapplicable to a content-neutral permitting scheme: n6

The procedural safeguards requirement has little relevance to the present case. That doctrine comes into play primarily when a State undertakes to shield the public from certain kinds of expression it has labeled offensive. Few cases invoke the requirement for procedural safeguards unless an explicit censorship scheme--which by definition is not content-neutral--is under attack, and the Supreme Court recently has confirmed [in Thomas] that the procedural safeguards doctrine is so limited in scope.

Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1328 (Fed. Cir. 2002) (upholding a federal regulation not limiting the amount of time for which the Veterans Administration could consider requests to speak on agency property) (citations and internal quotation marks omitted). At least two district courts also reached the same conclusion. n7

For these reasons, we reverse on this point and hold that the lack of time limits is constitutionally acceptable. The City's sign ordinance thus remains in effect, and--since Granite has thus far failed to comply with the applicable provisions--the City is entitled to summary judgment.

Even if we were to invalidate the sign ordinance in its entirety--which we are most assuredly not doing--we still would not order the City to allow the erection of the billboards. The City asserts that other provisions of the zoning ordinance apply--for instance, provisions relating to safety, wind loading, and building codes. The

district court, however, made no findings regarding these provisions. Thus, we have no way of knowing whether Granite is in compliance, and we would have to remand.

B. Damages and Attorneys' Fees

Granite is not entitled to actual damages because its as-applied challenge failed. See Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 (1978) (stating that "substantial damages should only be awarded to compensate actual injury").

Likewise, Granite is not entitled to nominal damages. Courts must award nominal damages only when certain absolute rights are violated--for instance, the right to procedural due process. Id. at 266, 98 S. Ct. at 1053-54. Here, neither Granite's First Amendment rights nor its procedural due process rights were violated. All that occurred was that Granite applied for a sign permit and was denied. Given that we upheld as constitutionally sound the provisions of the sign ordinance that applied to Granite--including the absence of specific time limits--Granite is not entitled to nominal damages.

Finally, Granite is not entitled to attorneys' fees under 42 U.S.C. § 1988. Attorneys' fees are proper only when a civil rights plaintiff qualifies as a "prevailing party." Farrar v. Hobby, 506 U.S. 103, 109, 113 S. Ct. 566, 572, 121 L. Ed. 2d 494 (1992). A party prevails by receiving "actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Id. at 111-12, 113 S. Ct. at 573. Here, the relationship between the parties is

unaltered. Granite is no closer to being permitted to erect its billboards than it was when litigation began. n8 Thus, Granite is not a prevailing party, and an award of attorneys' fees would be inappropriate.

III. CONCLUSION

We affirm in part the result reached by the district court by holding (1) Granite's as-applied challenge fails, (2) the provisions of the sign ordinance detailed supra note 1 are unconstitutional but severable, and (3) Granite is not entitled to either damages or attorneys' fees. We reverse with respect to whether the City's sign ordinance must contain specific time limits and hold it need not. Accordingly, the sign ordinance remains in effect, and the City is entitled to summary judgment.

AFFIRMED IN PART and REVERSED IN PART.

FOOTNOTES

* Honorable Paul C. Huck, United States District Judge for the Southern District of Florida, sitting by designation.

n1 After carefully scrutinizing the text of the entire sign ordinance, the district court invalidated and severed the following three provisions: (1) the provision prohibiting the display of political signs until 45 days or fewer before an election; (2) the provision limiting the maximum size of a free speech sign to four feet; and (3) the provision stating that signs may not be displayed on seawalls and piers unless they are approved by the City Manager. After severing these provisions, the district

court found the remaining text to be constitutionally sound.

n2 In particular, we note our review of the record confirms the district court's finding that three provisions of the sign ordinance are invalid and severable. See supra note 1. Accordingly, whenever we refer to the sign ordinance, we mean the sign ordinance less these provisions.

n3 The City's sign examiner stated in an affidavit that she does not "review any wording or content" of a proposed sign, other than to "ascertain if it pertains to an on-premises commercial or non-commercial activity or an off-premises activity and even then, [she] never make[s] a decision based on the viewpoint of the message."

n4 Consider, for instance, the case of someone wishing to erect a billboard. If that person applies for a sign permit, the City can only deny the application based on specific, objective criteria--e.g., the proposed billboard is too close to the road, too large in size, too tall, located on a lot with other structures, or located on a lot not zoned commercial/industrial. See supra Part I.

n5 In one short sentence, the district court termed permit delays a "serious issue" and referenced several news clippings attached to one of the affidavits. The news clippings, however, simply explain that the Mayor of the City decided to improve permit-processing time. Keeping Thomas's admonition in mind about the need to avoid deciding hypothetical claims (and realizing that the district court did not have the benefit of an opinion from this Court addressing billboard cases post-

Thomas), we note the Mayor's decision to improve administrative service does not necessarily mean a constitutional problem existed.

n6 The First Circuit did not consider the issue of time limits directly, but it did note the automatic issuance of permits negates any concern that "officials could effectively deny permits by dragging their feet." New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 25 (1st Cir. 2002). Nothing in our opinion should be construed as saying there is not merit--even wisdom--in incorporating specific time limits into the text of sign ordinances; rather, we simply hold time limits are not per se required when the licensing scheme at issue is content-neutral.

n7 E.g., B & B Coastal Enters., Inc. v. Demers, 276 F. Supp. 2d 155, 2003 WL 21730760, at *11 (D. Me. 2003); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321, 1333-34 (N.D. Ga. 2003). But see Diener v. Reed, 232 F. Supp. 2d 362, 378-79 (M.D. Pa. 2002) (reading Thomas narrowly and evaluating permit scheme at issue by comparing provisions in challenged ordinance to ordinance upheld in Thomas).

n8 We realize several minor provisions in the sign ordinance have been altered as a result of Granite's labors. See supra note 1. These provisions, however, have no bearing on Granite, and thus their alternation does not serve to confer prevailing party status upon Granite. See Farrar, 506 U.S. at 113-14, 113 S. Ct. at 574-75 (explaining that something more than a technical victory is required).

Case No. 8:01-cv-2250-T-30MSS

UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF FLORIDA
TAMPA DIVISION

GRANITE STATE OUTDOOR ADVERTISING,
INC.,
Plaintiff,

v.

CITY OF ST. PETERSBURG, FLORIDA; RICK
BAKER; and TISH ELSTON,
Defendants.

October 18, 2002

ORDER

THIS CAUSE came on for consideration upon the following motions: Plaintiff's Motion for Partial Summary Judgment (Dkt. #22), Plaintiff's Motion for Preliminary Injunction and supporting memorandum (Dkts. #24, 25), and Defendants' response thereto and Motion for Summary Judgment (Dkts. #43, 44), and Plaintiff's response in opposition (Dkt. #54). The Court has previously dismissed the Individual Defendants. (Dkt. #51). Both parties have also filed supporting affidavits and exhibits to their motions including certified copies of the ordinance at issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has filed a separate statement of facts in support of its Motion for Preliminary Injunction and Partial Summary Judgment (Dkt. #26). Defendants have incorporated their recitation of the facts as part of their supporting memorandum (Dkt. #44). The undisputed facts are as follows:

Plaintiff, Granite State Outdoor Advertising, Inc. ("Granite State"), is a Georgia corporation that is in the business of buying or leasing land upon which to construct signs to be used for the dissemination of both commercial and non-commercial speech. (Complaint, ¶6). Defendants point out that Plaintiff has never erected or operated a billboard but is in the business of acquiring billboard permits to sell to outdoor advertising companies. Defendants also point out that Plaintiff has filed several lawsuits, like this one, in other cities alleging that the sign ordinances of those cities are unconstitutional. In this case, Plaintiff has acquired, as an owner in interest, signed leased agreements authorizing Granite State to construct and operate one billboard sign on six different parcels of real property within the City of St. Petersburg.

The City of St. Petersburg is a political subdivision of the State of Florida and is described as a resort community on the west coast of Florida with beaches on the Gulf of Mexico and an economic base that relies on tourism. (See Dkt. #45, Tab 2). Its hospitality and employment sectors are among the City's largest employment sectors. Defendants point out that 18% of its general fund in the year 2002 went to leisure

services, supporting its position that the St. Petersburg has a "vested interest in maintaining the aesthetics of the community in order to attract and maintain its tourist industry base." (Dkt. #44 at 4).

Purpose of Sign Ordinance

As part of its Comprehensive Plan, St. Petersburg enacted a sign ordinance to regulate signage. Specifically, the purpose and intent of the sign code is to "establish minimum standards for an orderly system of signs and improve the quality of sign regulation in the City, and if adopted, on a county-wide basis in a manner that contributes to the economic well-being, by visual appearance, an overall quality of life in the City and county." § 16667(b)(1). The City specifically set forth the reasons for the passage of the ordinance: "1) inadequate sign regulation in the City; 2) lack of attention to the relationship between proper sign regulation and the economic and other effects on the community; 3) visual distraction and potential safety hazard posed to movement of traffic on public rights-of-way; and 4) failure to consider signs as an integral component of the urban landscape." § 16-667(a). In particular, the sign ordinance states that it was enacted to further the following objectives: "1) to establish a comprehensive system of sign regulation that addresses the full spectrum of principal sign considerations on a uniform basis; 2) to establish a standard for principal sign considerations that will foster a consistency and avoid disharmony between neighboring municipalities; 3) to establish a system of sign regulation that gives special recognition to protecting the natural characteristics and visual attractiveness that are essential to the tourist based economy of the City and

county; 4) to address the minimum standards necessary to reduce the visual distraction and safety hazard created by sign proliferation along the public rights-of-way; and 5) to recognize the significance of signs and appropriate uniform regulation therefor as a component of community appearance and character in the City in the highly urbanized county." § 16-667(b)(2).

Overview of Sign Ordinance

The sign ordinance, after defining numerous terms, lists the required dimensions of permitted signs, including the height, sign area and visual clearance. § 16-669. There are twenty-one types of signs which are exempt from the permitting process, including construction signs, real estate signs, political signs and garage sale signs. §16-670. The sign ordinance also prohibits various types of signs, such as portable signs, roof signs and vehicle signs. § 16-671. Sub-section three of this provision prohibits off-premises signs, except as provided elsewhere in the ordinance in commercial/industrial zones. Generally, one off premise sign is permitted per zone lot in commercial land use classifications provided there are no other structures on the site. §16-710(f).

Other permitted signs are allowed and are designated by land use qualifications, including residential (§16-707), public/semi-public (§16-708), mixed use (§16-709), commercial land (§16-710) and central business districts (§16-712). The ordinance also restricts temporary signage by location, area, number and term and also restricts inflatable signs, banners, and banners for temporary sales events. § 16-713. Pursuant to a "deeming clause" in the ordinance, on any sign, an

otherwise lawful non-commercial message may generally be substituted for any commercial message. § 16-667(b)(3). The ordinance specifies what constitutes a violation of the ordinance Fn1 and sets forth five specific remedies, one of which provides for penalties before the Code Enforcement Board, and allows for punishment pursuant to § 1-7. § 16-668. A copy of the sign ordinance, in its entirety, is attached as an appendix to this Order.

Severability Provisions

St. Petersburg's Code contains a severability provision which provides as follows: "[i]f any provision of this Code is found to be invalid, inoperative or unconstitutional by a Court, such finding shall not affect any of the remaining provisions of the Code." § 1-11. In addition, in the City's land development code, of which the sign ordinance is a part, it contains additional provisions for severability:

a) If any section, paragraph, subdivision, clause, sentence, or provision of this article shall be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair, invalidate or nullify the remainder of this article. But the effect thereof shall be confined to this section, paragraph, subdivision, clause, sentence or provision immediately involved in the controversy in which such judgment or decree shall be rendered.

b) In the event that the entire plan for this City shall be adjudged by any Court of competent jurisdiction to be invalid, the amendment of the previously existing comprehensive plan shall be deemed invalid. The

preceding unamended comprehensive plan shall stand as the comprehensive plan for the City.

§ 16-37.

Permitting-and Appeal Process

Section 16-692 addresses the specific requirements for the permitting process, including the application, fee, inspection and signage plan. For each permitted sign, St. Petersburg requires an approved signage plan which accurately addresses the site and sign area, complete with drawings, and a copy of the written consent of the owner, plus any other information required to establish full compliance with local laws. §16-692(e).

There is no time limit in the ordinance for the approval or denial of a permit. Although not in effect at the time of Granite State's application, in November 2001, the Mayor of St. Petersburg initiated a policy requiring that the city's permitting department respond to all permit applications for commercial projects within twelve business days. See Baker Fn2 Aff., ¶8; Elston Fn3 Aff., ¶8.

The sign ordinance also contains the following provision regarding appeals: Any person adversely affected by a decision in the permitting, or interpretation of any of the terms or provisions of this article may appeal such decisions. Requests for appeals shall be processed and reviewed by the Environmental Development Commission or the Board of Adjustment. The Environmental Development Commission shall review appeals in connection with a proposed sign on a zoned

lot on which the Environmental Development Commission has previously approved a site plan or special exception or in connection with a proposed use which requires either special exception or site plan approval by the Environmental Development Commission. The Board of Adjustment shall review appeals in all other cases.

Similarly, there are no time limits for the Commission or Board to complete any appeal. Also, as the City points out, should an appeal be denied, the petitioner would be entitled to a common law writ of certiorari as set forth in Hirt v. Polk County Bd. of County Commissioners, 578 So.2d 415 (Fla. 2nd DCA 1991).

Granite State's Applications

On October 25, 2001, Granite State submitted six applications for permits to erect off premise billboards at six separate locations. (Dkt. #45, Tab 4). These permits were denied seventeen days after submission, primarily for violating §16-710(f), which restricts off premises signs in commercial land use classifications to a maximum of one sign per zone lot and specifies other area, height and set-back requirements. Ruggiero Fn 4 Aff., ¶3. Specifically, Granite State was informed in the denial letter that the "informal site plans submitted with the applications indicate existing structures and uses on all of the proposed sites" and attached a copy of the specific provision and the land use designations for the proposed sites. (Dkt. 45, Exh 5).

Thereafter, without appealing the denial of the sign permit applications, Granite State filed this lawsuit on November 27, 2001. Almost identical to the complaint

filed by Granite State on August 31, 2001, against the City of Clearwater, Granite State alleges twelve counts against the Defendants claiming, in pertinent part, that the sign ordinance (1) violates the equal protection provisions of the Constitution, (2) violates Granite State's constitutional right to free speech under the First Amendment, and (3) constitutes an unlawful taking under the Fifth Amendment. Plaintiff requests injunctive relief and damages pursuant to 42 U. S.C. § 1983 and argues that it has vested rights in the issuance of the permits for which it applied.

II. LEGAL ANALYSIS

A. First Amendment Issues

1. Standing

Typically, standing requires that: 1) a plaintiff suffered an "injury in fact;" 2) that there be a "causal connection" between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and 3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." See Bischoff v. Osceola County, Fla., 222 F.3d 874, 883 (11th Cir. 2000). However, for First Amendment overbreadth challenges, the requirements for standing are generally more lenient. Id. at 884.

The Supreme Court recognized overbreadth challenges as "exceptions" to the general rule of standing for laws that are written "so broadly that they may inhibit the

constitutionally protected speech of third parties." Members of the City Council of Los Angeles v. Taxpayers for St. Vincent, 466 U.S. 789, 798 (1984) (addressing an ordinance banning handbills on public property). Such a challenge, in essence, permits third party standing for claims on the grounds that ordinance may pose a "realistic danger" that the statute itself will "significantly compromise recognized First Amendment protections of parties not before the court." Id. at 801. Generally, courts have permitted such challenges when the constitutional rights involve the First Amendment. Fn 5 See e.g., Sec'v of State of Md. v. Joseph H. Munson Co. 467 U.S. 947, 957-9, 967-8 (1984). Nonetheless, it still remains that a plaintiff must establish that he or she suffered some "injury in fact" as a result of the defendant's actions. Bischoff, 222 F.3d at 884 (citing Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392 (1988); Munson, 467 U.S. at 958; Nat'l Council for Improved Health v. Shalala,122 F. 3d 878, 883 (10th Cir.1997); Bordell v. Gen. Elec. Co., 922 F. 2d 1057, 1061 (2nd Cir.1991).

The overbreadth doctrine is "manifestly, strong medicine" that should be use "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Fn 6 In Taxayers for St. Vincent, after analyzing the plaintiffs' claims to determine whether they had standing to bring a facial challenge on overbreadth grounds, the Supreme Court found that their challenge was only "as applied" to their activities and heard only the "concrete case" before them. Taxpayers for St. Vincent, 466 U.S. at 802-3 (plaintiffs did not demonstrate that the ordinance applies to "any conduct more likely to be protected by the First Amendment" than their own). For a valid facial challenge on

overbreadth grounds, the Court found that there must be a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Id. at 801. Indeed, the overbreadth of the statute must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 800-1(quoting Broadrick, 413 U.S. at 615).

There is no exact definition of "substantial overbreadth;" however, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Id. at 800; see also Munson, 467 U.S. at 964. "The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." Taxpayers for St. Vincent, 466 U.S. at 800-1(quoting New York v. Ferber, 45 S U.S. 747, 772 (1982)). In Ferber, the Court rejected an overbreadth challenge to a statute prohibiting persons from knowingly promoting sexual performances by children, even acknowledging that the statute may reach certain educational materials, finding doubt that "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." Ferber, 458 U.S. at 773.

Defendants contend that Granite State does not have standing to assert the First Amendment claims it

makes in this case; nor should it be permitted to make an overbreadth challenge to the Code. Defendants contend that Granite State has not suffered an injury in fact as a result of the City's application of the sign ordinance to it. Specifically, Defendants argue that Granite State cannot establish that the section under which it was denied its permits, § 16-71 0(f), which restricts off-premises signs, is overbroad, vague or unconstitutional. (Dkt. #44 at 11). To the contrary, Granite State contends that § 16-71 0(f) is unconstitutional because: 1) it "discriminates" against non-commercial speech because it applies only to signs with messages deemed "off premises,"(2) it requires applicants for off premises signs to submit applications for permits prior to posting their signs, which it contends is void as an impermissible prior restraint on speech; 3) the section restricts commercial and non-commercial signs without satisfying the Central Hudson Fn 7 analysis; and 4) it is invalid because it is inextricably intertwined with the "unconstitutional whole of the sign ordinance," thus, preventing severance. (Dkt. 44 at 3-4).

Granite State points to other provisions, like the restrictions on political signs, which it alleges are constitutionally infirm as applied to third parties. Granite State's facial challenge to the ordinance is based on three arguments. The ordinance is (1) an impermissible content-based regulation that violates equal protection by favoring commercial speech over non-commercial speech, (2) impermissibly vests government officials with undue discretion, and (3) the permitting (and appeals) provisions are an impermissible "prior restraint" that does not comply with the requirements of Freedman v. Maryland 380

U.S. 51 (1965). Fn 8 Specifically, Granite State points to several cases involving permitting schemes for adult businesses in which the Court allowed a facial challenge to the ordinance based on a lack of time limits on the permitting process. Fn 9 See e.g., Redner v. Dean, 29 F.3d 1495, 1502 (11th Cir. 1994) (allowing facial challenge for prior restraint that could result in the "suppression of expressive activity for an indefinite period of time").

The Court rejects Defendants' argument that Granite State does not have standing because it was not "actually injured" by the provisions that do not apply to Granite State. Cf. Messer v. City of Douglasville, Ga., 975 F. 2d 1505, 1514 (11th Cir.1992) (affirming district court's holding that Messer does not have standing to challenge the board of appeals, as he did not request or receive a hearing - the appeal in this case had been made by the codefendant billboard companies who had since been dismissed from the case with prejudice). Specifically, Defendants point out that Granite State's permit applications were denied in seventeen days (a "reasonable" time) and no appeal of the denials were taken by Granite State.

The Court finds, however, that because the permitting and appeals process set forth in §§16-689 and 692 apply only to decisions regarding signs (as opposed to other zoning decisions), Granite State's allegation that, without time limits, government officials have unbridled discretion in determining the time to act on a permit (or appeal decision) is specific just to signs, or speech rights. Fn 10 Hence, the Court views the reach of sign ordinance's permitting and appeals provisions as implicating situations necessarily involving signs and

First Amendment rights. See National Advertising v. Ft. Lauderdale, 934 F. 2d 283, 285 (11th Cir.1991). In conclusion, after extensive analysis, the Court is constrained to find that Granite State has standing to make an overbreadth challenge to the provisions of the ordinance that do not apply to it because its claims directly implicate, and could accordingly "chill," the First Amendment rights of persons not before the Court.

2. Severability

Severability of a local ordinance is a question of state law. See City of Lakewood v. Plain Dealer Publishing Co., 486 U. S. 750, 759 (1988); see also Metromedia, 453 U. S. at 521 n.26. Under Florida law, the test for severability is as follows: "[w]hen a part of a statute is declared unconstitutional, the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said that the legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken." Waldup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (challenging application of revised gain time statute for habeas corpus challenge). The Florida Supreme Court simply stated: "[t]he severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this

intent." Ray v. Mortham, 742 So.2d 1276, 1280 (Fla. 1999) (citations omitted).

Courts have noted that the existence of a severability clause carries with it a "presumption" that the legislative authority would have enacted the remaining provisions and that the preference for severance is "particularly strong in cases containing a severability clause." See Major Media of Southeast, Inc. v. City of Raleigh, 621 F. Supp. 1446, 1454 (E.D. N.C. 1985) (upholding severability clause). Cf. Nat'l Advertising v. Town of Niagra, 942 F. 2d 145, 148 (2nd Cir. 1991) (finding severance improper despite existence of severability clause); United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (the ultimate determination of severability rarely turns on the presence or absence of a severability clause). Of course, in construing an ordinance for purposes of a facial challenge, the Court must construe any ambiguities in the ordinance as a whole in a manner which avoids any constitutional problems, if possible. See South Lake Property Ass'n Ltd. v. City of Morrow Ga., 112 F. 3d 114,119 (11th Cir.1997).

In addressing Granite State's allegations that certain of St. Petersburg's ordinance are "content-based" or permit "undue discretion" by government officials, the Court specifically addresses severance for each provision. In some instances, the Court finds severance is appropriate, as long as the legislative purpose of St. Petersburg's sign ordinance is preserved and speech is no more restricted after severance. Ultimately, the Court agrees with Granite State that it is not able to sever the permitting provisions to remedy the constitutional infirmities therein.

3. Content-Based v. Content-Neutral Distinction

As this Court noted in its ruling in a similar case, Granite State Outdoor Advertising, Inc. v. City, of Clearwater, 213 F.Supp.2d 1312 (M.D. Fla. 2002), there is myriad of First Amendment opinions relating to the constitutionality of sign regulations, beginning with the Supreme Court's leading decision on billboard regulations in Metromedia, lnc. v. City of San Diego, 453 U.S. 490, 570 (19 8I) (plurality decision) (Rehnquist, J., dissenting, who referred to the plurality decision as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn"). As the Court more fully discusses below, there is much variety and diversity of opinions in this area (in addition to sign ordinances, courts have reviewed First Amendment challenges to adult entertainment clubs, tobacco advertising and the noise volume of music concerts), suggesting that constitutional law on this subject is far from clear.

One of Granite State's primary arguments, based in large part on the plurality decision in Metromedia, is that the St. Petersburg sign ordinance is unconstitutional because it is an impermissible content-based ordinance that cannot survive strict scrutiny review. In Metromedia, Justice White, writing for the plurality, found that San Diego's sign ordinance was unconstitutional because it impermissibly favored commercial over non-commercial speech. It was also noted that although the ordinance's general prohibition of signs created the "infringement," the additional exceptions to the prohibition "are of great significance in assessing the strength of the city's interest in prohibiting billboards." Id. at 520. Relying on this

argument and its claim that the ordinance favors commercial speech over noncommercial speech, Granite State cites to many of the exceptions contained in St. Petersburg's sign ordinance (for example, construction signs or real estate signs) as evidence that the sign ordinance is content-based. Fn 11

The "Catch-22" of Sign Regulations

This almost-conclusory mandate that an ordinance with a category or exception for a sign based on its content automatically makes the ordinance unconstitutional per se is the proverbial "Catch-22" confronting many cities and municipalities when they attempt to regulate signs in their communities. See Metromedia, 453 U.S. at 560 (Burger, J. dissenting,) ("having acknowledged the legitimacy of local government authority, the plurality largely ignores it"). Fn 12 Granite State's argument clearly demonstrates this "catch-22": (1) it is permissible for the government to regulate, or prohibit, signs to further legitimate governmental interests (Metromedia) ; (2) any sign prohibition must provide an exception for "For Sale" signs (Linmark); (3) exceptions or regulations of signs requiring a reading of their message are content-based Nat'l Advertising Co. v. Town of Niagra, 942 F.2d 145 (2nd Cir. 1991); (4) content-based sign regulations are generally unconstitutional when subject to strict scrutiny review (Burson v. Freeman, 504 U.S. 191 (1992)); and (5) since an exemption allowing "For Sale" signs necessarily requires one to read the words "for sale" on the sign, it is impossible to draft a sign ordinance that is constitutional. Some courts have followed this conclusory theory, see e.g., North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755

(N.D. Ohio 2000); Nat'l Advertising Co. v. Town of Bablyon, 900 F2d 551 (2nd Cir. 1990); however, others have tried to formulate ways to avoid this "catch-22." See. e.g., Rappa v. New Castle County, 18 F.3d 1043 (3rd Cir. 1994). Fn 13

Review of Relevant Cases

It is instructive to review the Supreme Court's seminal decisions in this area. Justice Stevens, who filed a dissenting opinion in Metromedia, authored the Court's majority opinion in Members of the City Council of Los Angeles v. Taxpayers for St. Vincent. 466 U.S. 789 (1984), which discussed at great length the general principles, history and other cases involving the First Amendment, beginning with the country's first printing presses and censorship of movies, Fn 14 stressing the "unacceptable risk of suppression of ideas." Id. at 797, 804 (concluding that the "general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"). In Taxpayers for St. Vincent, the Court upheld an ordinance prohibiting the posting of handbills and signs on public property and public objects (like utility poles), because it found that it was within that city's constitutional power to attempt to improve its appearance, an interest that was "basically unrelated to the suppression of ideas" and the ordinance was reasonably tailored to do so, with available alternative channels of communication. Id. at 804, 813-15. The Court held that "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas the City finds

distasteful or that has been applied to Appellees because of the views that they express." Id. at 804. This decision suggests that an ordinance need only be subject to strict scrutiny if it serves to regulate a particular viewpoint or amounts to censorship. Fn 15

This content-based theory warranted mention by the Court in a non-sign case, Cincinnati v. Discovery Network, 507 U.S. 410 (1993) (Stevens, J. delivered the majority opinion). Discovery Network involved the city's attempt to enforce an ordinance banning "commercial handbills" on public property by ordering the removal of newsracks from which the "commercial handbills" were disseminated. These newsracks looked just like those containing newspapers. The Court found the ordinance unconstitutional primarily because it was not a "reasonable fit" of the city's legitimate interests in aesthetics and safety and their chosen means of furthering those interests, a "sweeping ban" on the "commercial handbill" newsracks which were only a small fraction of the total newsracks on the street. Id. at 42829.

After so holding, the Court discussed the content-based versus content-neutral distinction, finding that the ban on newsracks with "commercial handbills" was impermissibly content-based. Id. at 428-9. Beginning with the premise that the government may impose "reasonable restrictions on time, place, or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech, the Court was not persuaded that the justification of preserving aesthetics and safety adequately justified the regulation because "the very basis of the regulation is the difference in content

between ordinary newspapers and commercial speech." Id. at 429. Fn 16 Although this is one of the few commentaries by the Supreme Court on this specific issue, it does not appear to be critical to the Court's holding, which focused primarily on the lack of "reasonable fit." Fn 17

Earlier, in Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court upheld a municipal regulation that required performers to use sound technicians and a sound system provided by the city, finding that it did not violate the free speech rights of the performers. The Court held that the regulation (of the expressive activity of music) is content-neutral, "so long as it is justified without reference to the content of the regulated speech."' Id. at 791 (citations omitted). The Court found the government's purpose of controlling noise levels at bandshell events was a "controlling consideration... [that had] nothing to do with the content." Id. at 791-2 (citations omitted). The Court also considered and rejected the plaintiffs argument that the statute was unconstitutional on its face because it placed "unbridled discretion in the hands of city officials charged with enforcing it." Id. at 793 (citations omitted). The Court concluded that the city's regulation was narrowly tailored to serve a significant government interest by protecting its citizens from unwelcome noise. Id. at 796.

It is also instructive to review the Supreme Court's ruling in Ladue v. Gilleo, 512 U. S. 43 (1994). This case involved an ordinance that banned all residential signs except those falling within one of ten exemptions. The petitioner resident wanted to place a sign about the war in the Persian Gulf - first on her front lawn, and when

that was denied, then in the window of her home. Id. at 45-46. The Court found that the ordinance violated the resident's right to free speech, in large part because there were no alternative means of communication for her. Id. at 54. The Court found that as a resident, the plaintiff was "almost completely foreclosed in any venerable means of communication that is both unique and important." Id. As Justice O'Connor added in her concurrence, the Court circumvented its "normal inquiry," which first determines whether a regulation is content-based or contentneutral, then applies the appropriate level of review (i.e., strict or intermediate scrutiny). Id. at 59 (O'Connor, J., concurring). Justice O'Connor even goes so far as to note that regulations are "occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. . . [t]he content distinctions present in this ordinance may, to some, be a good example of this." Id. at 60.

It is equally instructive to review the Supreme Court's most recent rulings on the facial constitutionality of a municipal park ordinance as reviewed under the First Amendment. See Thomas v. Chicago Park Distr., 122 S. Ct. 775 (2002). Thomas involved a municipal park ordinance requiring individuals to obtain a permit before conducting events for more than fifty persons and providing an application process with a fourteen day time limit for granting or denying the application. Applications could be denied on any of thirteen specific grounds. An applicant is given seven days to appeal the decision on the application after which it may seek judicial review in state court by common law certiorari. The plaintiffs in Thomas sought to secure a permit to hold a rally advocating the legalization of marijuana.

Upon the denial of their application, they filed an action alleging that the ordinance was unconstitutional on its face. The Supreme Court found otherwise, upholding the ordinance as content-neutral.

This Court notes that most of Chicago Park's listed grounds to deny a permit, eleven of which are noted in footnote 1 of the Court's opinion, are decidedly content-neutral. Id. at 777 n. l. For example, a permit may be denied Fn 18 if the application is not complete, the application fee is not attached, or the applicant is legally incompetent to contract. Id. Yet, interestingly, others maybe construed as being more "content-based." For example, a permit may be denied if the "use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park ... or the public" or a permit has previously been granted authorizing uses that "do not reasonably permit multiple occupancy of the particular park or part thereof." Id. But these grounds are clearly not using any content distinction as a censorship scheme, nor are they an attempt to limit activities in the park based on the applicant's viewpoint. In fact, the Court upheld the park ordinance as a "content-neutral time, place and manner regulation," finding that the licensor is not authorized to "pass judgment on the content of the speech" and that "[n]one of the grounds for denying a permit has anything to do with what a speaker might say." Id. at 779.

In comparison, the Supreme Court did not agree with the plaintiffs that the park ordinance was like the censorship scheme in Freedman v. Maryland, Fn 19 which would have required that litigation be initiated

by the park district every time it denies a permit and that the ordinance specify a deadline for judicial review. Id. at 779. Specifically, the Court found that the park's licensing scheme was not "subject matter censorship" and as a "contentneutral time, place, and manner regulation of the use of a public forum," it does not have to adhere to the procedural requirements set forth in Freedman. Id. at 779-80. Fn 20 The Court also found that government officials were not given unduly broad discretion in determining whether to grant or deny a permit. Id. at 78081.

One of the few issues that is clear under the Supreme Court's decision in Metromedia is that government is permitted to regulate speech through sign ordinances that are not content-based, provided they are narrowly tailored to further the significant government interests. Metromedia, 453 U.S. at 511-12, 516. Once a regulation is found to be viewpointneutral, it is subject to intermediate scrutiny, which requires that the state demonstrate that: 1) the act serves a substantial governmental interest (unrelated to the suppression of free expression), and 2) it is narrowly drawn to serve that interest without unnecessarily interfering on First Amendment freedoms (that is, the restriction in First Amendment freedoms is no greater than is essential to the furtherance of the interest). Taxpayers for St. Vincent, 466 U.S. at 805. The Eleventh Circuit summarized that to uphold a viewpointneutral regulation of speech, a government must show that "1) it has the constitutional power to make the regulation, 2) an important or substantial government interest unrelated to the suppression of free speech is at stake, and 3) the ordinance is narrowly drawn to achieve its desired ends, leaving other channels for the

communication of information." Messer v. City of Douglasville, Ga., 975 F. 2d 1505, 1510 (1992). Indeed, in Messer, the Eleventh Circuit upheld a limit on the use of portable signs as a partial solution for its aesthetic concerns, stating "[since] it could have prohibited all portable signs in furtherance of this interest, by allowing a limited number, it is in fact more narrowly tailoring the restrictions to meet its purpose." Messer, 795 F. 2d at 1514. However, it need not be the least restrictive means possible. See Rock Against Racism, 491 U.S. at 78 l. And, the ordinance should leave open ample alternative channels of communication.

The Supreme Court specifically addressed two "significant government interests" in Metromedia - traffic safety and aesthetics of the community. Metromedia 453 U.S. at 509-10 ("[t]here is nothing here to suggest that these ... accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards ... are unreasonable... [w]e reach a similar result with respect to the second asserted justification for the ordinance-advancement of the city's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an esthetic harm") (citations and quotations omitted). It is also clear from the decision in Taxpayers for St. Vincent that a state may legitimately exercise its police powers to advance its aesthetic interests and traffic safety. See Taxpayers for St. Vincent, 466 U.S. at 806-07 (in effect affirming Metromedia's holding that a city's aesthetic interests are sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards). See also Messer, 975 F.2d

at 1510 (it is "well settled that both traffic safety and aesthetics are substantial governmental goals"); Southlake Property Assocs., Ltd. v. City of Morrow, Ga., 112 F.3d 1114, 1116 (11th Cir. 1997) (recognizing Morrow's right to "clean, aesthetically pleasing and safe business thoroughfares"); Harnish v. Manatee County, Fla., 783 F.2d 1535 (11th Cir. 1986) ("prohibition of portable signs to eliminate aesthetic blight passed muster under the First Amendment").

What is not clear from Metromedia, or the Court's other decisions, is exactly how a city or municipality can constitutionally regulate signs to further these interests. Many courts, like this one, and many commentators, are concerned that local governments have been placed in a tenuous and near impossible position in drafting a constitutional or contentneutral sign ordinance. See e.g., Cordes, Mark, "Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection," 74 Neb. L. Rev. 36 (1995); Bond, R. Douglass, "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 Mich. L. Rev. 2482 (1990).

In essence, courts are left to define the constitutional perch upon which local governments may rest on the slippery slope of permissible content-neutral regulations. It is impossible not to acknowledge, as this Court does, that a sign ordinance must be justified by something other than its content, stressing Justice Stevens' opinion that the First Amendment (and the resulting content-based distinction) was created to protect speech from the dangers of government censorship and to stop the government from suppressing the expression of ideas and public debate

through the guise of regulation. Ward v. Rock Against Racism, 491 U.S. 781 (1989). See also Taxpayers for St. Vincent, 466 U.S. at 789; Rappa, 18 F. 3d at 1043.

What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations on signage and make exceptions for distinctions required by law (i.e., for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (i.e., warning or construction signs). For example, there is simply no other way to make an exemption or classify a for sale sign as a for sale sign without reading the words, "For Sale," on the sign, or classifying a sign as a warning sign without reading the words, "warning Bad Dog," on the sign. In many cases, this classification raises the "red flag" of an impermissible Fn 21 "content-based" regulation. See Metromedia, 453 U.S. at 565 (Burger, J. dissenting) (referring to differentiating among topics and "noncontroversial things" and "conventional" signs such as time-and-temperature signs, historical markers, and for sale signs).

Hence, in looking at the general principles of the First Amendment as the Court did in Taxpayers for St. Vincent, the real issue becomes whether the distinctions or exceptions to a regulation (as well as any areas of government discretion) are a disguised effort to control the free expression of ideas or to censor speech. Common sense and rationality would dictate that the only method of distinguishing signs for

purposes of enforcing even content-neutral regulations, such as number, size or height restrictions, is by their message. For example, a regulation permitting a freestanding billboard sign to be larger than a political yard sign which is larger than an address sign is a differentiation based on content (albeit for purposes of regulating size). This should not, on its own, render an ordinance unconstitutional. Indeed, it appears to be a matter of semantics. Fn 22 In rendering its opinion today, this Court focuses on whether the government regulation is trying to impermissibly censor speech or limit the free expression of ideas.

Application to St. Petersburg Ordinance

The Court finds that St. Petersburg's ordinance is similar to the ordinance in Thomas in that the requirements of Freedman do not apply because the sign ordinance is not contentbased and therefore does not require strict scrutiny review. However, in making this finding and given the guiding principles set forth supra regarding severance, the Court finds that the provisions restricting political speech are impermissibly restrictive but can be severed, thus eliminating any unjustified content-based distinctions and preserving the content neutrality of the sign ordinance. Fn 23

On vs. Off Premise Signs

Plaintiff argues that the ordinance is impermissibly content-based due to the offpremise/on-premise distinction - the very provision under which St. Petersburg denied Granite State permit applications. Plaintiff objects that "signs with off premises or other noncommercial messages" are only allowed in a "few

commercial zoning districts and only under very restrictive conditions." Dkt. 23 at 5.

The St. Petersburg ordinance does not ban off premise (or billboard) signs, but places restrictions on the number, size and location of the billboards, in an attempt to further the goals set forth in §16-667. Generally, the ordinance prohibits off premise signs, except in commercial and industrial land classifications, and then only one per zone lot provided it is the only structure erected on the property. See § § 16-671(3), 710(1)(f). An off premise sign is defined as "any sign identifying or advertising a product, business, person, activity, condition, or service not located or available on the same zone lot where the sign is installed and maintained ." Fn 24 §16-666(17).

Several cases have addressed the issue of off premise signs or signs that are designated by their relationship to the property on which they are located. See e.2., Rappa v. New Castle County, 18 F.3d 1043 (3rd Cir. 1994) (noting that a sign distinction is not content-based if it has a location-based relationship to the sign that was not made in an attempt to censor viewpoint). These cases have found that this type of distinction is not an attempt by the government to censor speech when enacted for the legitimate government purposes of aesthetics and safety. Some have even found it to be a content-based distinction but upheld it as constitutional under the Central Hudson test. See Onsite Advertising Inc, v. City of Seattle, 36 Fed. Appx. 332 (9th Cir. 2002).

Defendants rely heavily on the reasoning of a similar case in Oregon. Outdoor Media Dimensions, Inc. v. State of Or., 945 P.2d 614 (Or. 1997). The Oregon Court

of Appeals upheld the constitutionality of a state sign ordinance limiting "outdoor advertising signs," or off-premise signs, along the state's highways, finding that the on-premise/off-premise distinction does not impose a content-based restriction on speech, nor does it impermissibly favor commercial or noncommercial speech. Outdoor Media Dimensions, 945 P.2d at 621-22.

Here the Court agrees with Defendants. There is no evidence that the off premise distinction in St. Petersburg's ordinance impermissibly restricts speech based on content. In fact, St. Petersburg's sign examiner attests that she does not "review any wording or content" of a proposed sign, other than to "ascertain if it pertains to an on-premises commercial or non-commercial activity or an off premises activity [and e]ven then, [she] never make[s] a decision based on the viewpoint of the message." Ruggiero Aff., ¶6. Further, the Court finds that these restrictions are narrowly tailored to the City's legitimate purposes in restricting signage, namely, to limit visual distraction and potential safety hazards and to consider signs as an "integral component of the urban landscape." § 16-667(a).

Political Signs

A political sign is defined as "any sign which constitutes a political advertisement which the primary purpose is related to the candidacy of any person for public office or any issue which has been submitted for referendum approval." § 16-666. The ordinance contains several regulations on the size, placement and duration of political signs: (1) no more than one political sign "per candidate or issue" is allowed on each lot, except for a corner lot which allows two signs per candidate or

issue; (2) the sign shall not be installed "earlier than 45 days before the election" and "shall be removed within one week after the election;" (3) the sign shall not be illuminated, (4) shall be placed at least twelve feet from the curb, and (5) shall not exceed six square feet in area and eight feet in height. § 16-670(a)(11).

Granite State contends that this provision unconstitutionally restricts noncommercial speech. Granite State likens this provision of the ordinance to one declared unconstitutional in City of Ladue v. Gilleo, 512 U.S. 43 (1994).

In Ladue, the Supreme Court has upheld the "unique and important" right of residents to post political signs at their residences. City of Ladue v. Gilleo, 512 U.S. 43 (1994) (finding that sign ordinance banning residential signs violated plaintiff's right to free speech by prohibiting her from displaying a sign stating "For Peace in the Gulf' from her home). The Court stressed that displaying a sign from one's own residence carries a message quite distinct from placing the sign someplace else or conveying the same text or picture by other means, "for it provides information about the speaker's identity, an important component of many attempts to persuade." The Court also stressed that residential signs are a fairly cheap and convenient form of communication and there was not sufficient alternative means for the plaintiff in Ladue to express her message. Id. at 2045.

St. Petersburg's ordinance does not ban political signs, but merely places number, size and durational requirements on the signs. Additionally and significantly, St. Petersburg also allows window signs

for up to fifty percent of the total window pane area of each structure Fn 25 and one "free speech" sign. Fn 26 §§16-670(a)(14),(19). The heart of Granite State's complaint about these alternative signs is the size restrictions. See Dkt. 23 at 7 (resident not allowed to post noncommercial sign measuring three feet by three feet in yard or window sign exceeding one-fourth of total pane area). The Court finds that these restrictions are not based on content and finds that they are rationally related to the City's purposes in enacting the ordinance. Additionally, with reasonable alternative forms of communication available for residents, this case moves outside the province of Ladue.

Other cases have specifically addressed political speech. For example, the Supreme Court has held that singling out political speech is not per se unconstitutional. See e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding government's right to refuse to accept political advertising for space on city transit system buses); see also Heffron v. Internat'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding government's right to limit locations on public fairground to distribute religious literature). Courts and commentators have also addressed whether a time limitation on political signs is constitutional. See Whitton v. City of Gladstone, 54 F. 3d 1400, 1403-04 (8th Cir. 1995) (thirty day time restriction on political signs is unconstitutional); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 467 S.E.2d 875, 882 (Ga. 1996) (striking down time limits of seven weeks on political signs); Collier v. City of Tacoma, 854 P.2d 1046 26 (Wash. 1993) (prohibiting political signs sixty days before election was unconstitutional); see also Gerard, Jules B., "Evolving Voices in Land Use

Law: Election Signs and Time Limits," 3 Wash. U.J.L. & Pal. 379 (2000). However, some cases have found it constitutional to have post-election time limits to take down election-related signs. Outdoor Media Dimensions, Inc. v. State of Or., 945 P.2d 614 (Or. 1997) (thirty days after the election); Collier v. City of Tacoma, 854 P. 2d 1046, 1057 (Wash. 1993) (seven days to remove signs).

In the totality of the case law and commentary on this issue, the Court feels constrained to find that the forty-five day time limit before the election is an unconstitutional restriction on speech, even with alternative forums of expression, like free speech and window signs, available. The Court, however, finds the seven-day time period for removal after the election is a reasonable limitation justified by St. Petersburg's purpose of controlling aesthetics.

In viewing whether these time periods may be severed from the statute under the guiding principals set forth supra, the Court finds that the forty-five-day time limit is severable, as striking it increases speech and maintains the constitutionality of the ordinance. On this issue, the Court agrees with the reasoning of a similar case, Brayton v. City of New Brighton, 519 N.W. 2d 243 (Minn. 1994) (upholding ordinance that allowed one non-commercial sign all year long and additional non-commercial signs during the election season). Accordingly, the Court finds that § 16-670(a)(11) is constitutional after the forty-five day time limit is stricken; thus, allowing one political sign "per candidate or issue" with no time limit except that the signs) shall be removed within seven days after the election for

which it/they are intended. The size requirements set forth in § 16-670(a)(11) remain unchanged.

Thus, for the reasons set forth herein, the Court agrees with Defendants that the distinctions and exceptions to the St. Petersburg ordinance do not render it content-based. See also Granite State Outdoor Advertising, Inc., v. City of Clearwater, 213 F.Supp.2d 1312, (M.D. Fla. 2002).

Free Speech Signs

The sign area permitted for a free speech sign (four feet) is smaller than the sign area permitted for a political sign (six feet). Although Granite State did not raise this issue, such a difference in size requirements seems indefensible when viewed in connection with St. Petersburg's stated purposes; namely, the "lack of attention to the relationship between proper sign regulation and the economic and other effects on the community" and to limit "visual distraction and potential safety hazards." It is difficult to see how this four feet requirement is narrowly tailored to furthering these goals when political signs are allowed six feet in area. Like Discovery Network, it does not appear that there is a "reasonable fit" in differentiating between four and six feet for political and free speech signs. In viewing whether this size requirement can be severed from the ordinance without further restricting speech, the Court finds that the portion of the ordinance restricting free speech signs to four feet in area can be severed and is therefore stricken.

4. Equal Protection

Granite State also claims that the ordinance violates the equal protection clause because it impermissibly favors commercial speech over non-commercial speech. Granite State contends that there are "innumerable" examples of "favoritism for commercial over noncommercial speech." Dkt. 23 at 6. Granite State cites several examples to support this contention -- a sign measuring thirty-two square feet is permitted "as long as its message involves construction" and in apartment complexes and subdivisions, signs measuring twenty-four square feet are allowed, but a political sign of that size is not allowed. Dkt. 23 t 6-7.

Within the context of commercial speech, the Court finds that exemptions for certain signs, such as construction signs, are rationally related to the advancement of the enumerated purposes of the ordinance. Just as the Court has found that the other exemptions in the ordinance are a "reasonable fit" between the Defendants' means and the ends of satisfying First Amendment concerns, so it similarly finds for the commercial speech Plaintiff alleges is impermissibly favored. This is bolstered by the deeming clause in which St. Petersburg specifically provides that any lawful noncommercial message may be put on a sign in lieu of any other copy. § 16-667(b)(3).

Moreover, as it relates to commercial speech, the Court finds that the restrictions are valid under the Central Hudson analysis because they seek to implement and directly advance substantial government interests and reach no further than necessary to accomplish that obJective. As other courts have held, the government

may make certain restrictions on commercial speech, which is not entitled to as much protection as non-commercial speech. See e. . Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989); see also Metromedia, 453 U.S. at 506.

Granite State also attempts to argue the opposite conclusion, that the ordinance violates equal protection by impermissibly favoring noncommercial speech over commercial speech. In support of this argument, Granite State cites "numerous examples of favoritism" -- restaurants, museums, real estate and theaters. (Dkt. #23 at 8). As the Court has ruled supra, St. Petersburg's ordinance is content-neutral, and as such, the Court finds that the time, place and manner regulations contained therein are reasonable and narrowly tailored to advance the substantial and carefully enumerated government purposes set forth in § 16667 of the ordinance. It does not impermissibly favor commercial speech over noncommercial speech and the Court finds that the ordinance does not violate the equal protection clause.

5. Discretion of Government Officials

Where licensing is applicable to speech, the discretion of the licensing official must be limited to avoid the dangers of censorship. As Justice Scalia explained for the unanimous Court in Thomas:

Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or

disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.

Thomas, 122 S. Ct. at 780 (citations omitted). A court may look to well-understood or uniformly applied practice or binding administrative construction to set limits on official discretion that are not otherwise apparent from the face of the regulation. See e.g., Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002).

With these guiding principles in mind, the Court turns to Plaintiff s allegations that certain provisions grant City officials undue discretion. In some cases, the Court agrees and finds that a particular section should be stricken. In others, the Court finds that the government's discretion is acceptable or reasonable.

Specifically, § § 16-671(9) and (10) prohibit signs that are attached to or painted on seawalls and piers and signs that are "in or on" bodies of water "unless otherwise authorized, such as official regulatory or warning signs approved by the City Manager." These provisions contain no objective criteria for a government official to "otherwise authorize" such a sign and the examples provided therein are not an exhaustive list. Accordingly, without some guidance or objective criteria, this language provides undue and impermissible discretion to government officials and can serve to impermissibly limit or censor speech. In accordance with the principles of severance discussed supra, the Court strikes these provisions. Because the

provisions are contained within the section of "prohibited signs," any attempt to sever the objectionable phrase would impermissibly result in further restricting speech.

In the list of signs exempt from the permitting process, Fn 27 Granite State contends that St. Petersburg's classification for "small off premise signs that are for a public/semi-public purposes and are directional only" makes the ordinance impermissibly content-based and gives government officials undue discretion. § 16-670(a)(13). The Court disagrees with Granite State's conclusion because this term is adequately defined in § 16-666(21) Fn 28 and its use in § 16-670(a)(13) is limited to only "directional" signs. Fn 29

Granite State points to another type of exempt sign, government and public signs, which it contends gives government officials undue discretion in determining what signs fit in this category. §16-670(a)(6). Although these terms are not specifically defined by the ordinance, the provision reads, in full, "including but not limited to, community identity and entrance signs, signs for special community events, and coordinated Countywide trail-blazing signs that provide direction to places of interest." With the additional guidance provided in this section, the Court finds that it provides government officials with adequate standards so that they do not have undue discretion in making signage determinations.

The Court is also not convinced that government officials have undue discretion with regard to §16-692 which provides that the City Manager must approve a "signage plan" before any sign permits are approved.

The ordinance adequately prescribes eight, largely objective, criteria Fn 30 for a permit applicant to include in the "signage plan." § 16-692(e). The Court finds this criteria is narrowly tailored to and reasonably related to the City's purposes in enacting the ordinance. Moreover, with the specific guidance as to what each signage plan must contain, the Court finds this section provides reasonable discretion to government officials.

Defendants also suggest that government officials have "impermissible discretion" in § 16-687 which reads, "[w]here there is ambiguity or a dispute concerning the interpretation of this article, an interpretation will be rendered by the City Manager." Granite State argues that this provision allows the City to "favor a message they could probably permit [] pursuant to one of the ill-defined exemptions" found in the ordinance. Dkt. 25 at 15. The Court disagrees with Plaintiff and finds that this provision affords government officials reasonable discretion.

Permitting and Appeals Process

Granite State argues that St. Petersburg's sign ordinance does not provide the "necessary procedural safeguards" to guide City officials in approving or denying sign permits within a certain time limit. Defendants maintain that, consistent with Thomas, the St. Petersburg permitting department "reviews permits in a timely fashion" and that Granite State's application were reviewed in seventeen days, "not an unreasonable time, given the fact that the Permit Department see thousands of permit applications a month." (Dkt. 44 at 18). Fn 31 Granite State opposes this argument in part because it believes that the St.

Petersburg ordinance is not content-neutral and also because government officials are allowed undue discretion (as discussed supra).

Although Granite State's argument is framed in terms of non-compliance with Freedman, the Court does not agree with that reasoning as set forth supra. The Court is, however, disturbed by the lack of time limits in the permitting and appeals provisions because they allow government officials unfettered discretion in determining when to act on a permit application, or on an appeal of a permit denial. Although City officials acted on Plaintiff's permit applications within seventeen days, the record evidence attached to Baker's affidavit illustrates that permit delays were a serious issue for those individuals applying for permits in the City of St. Petersburg. In light of this record, the Court finds that the lack of time limits in the permitting process, although not directly affecting Granite State, render this provision unconstitutional because it allows government officials undue, and possibly subjective discretion in determining whether to approve permit applications. Fn 32 Such potential to "chill" the exercise of First Amendment rights is impermissible.

This finding is bolstered by the fact that St. Petersburg's permitting and appeals provisions apply only to sign permits and speech rights. This more narrow reach is unlike the permitting and appeals provisions of Clearwater's sign ordinance in Granite State v. City of Clearwater which applied broadly to all Clearwater's development review decisions, not just to sign permits.

Furthermore, Granite State argues that this defect in the permitting process cannot be remedied by severance because severing the permitting requirements would remove the "very heart of the ordinance," leaving the ordinance more restrictive of speech. On this issue, the Court is inclined to agree with Plaintiff. The permitting process is central to the sign ordinance. If the Court were to attempt to remove the objectionable provisions governing the permitting process, the surviving ordinance would not function independently. Nor is it appropriate for the Court to add appropriate and necessary time limits.

Granite State makes the same argument regarding lack of time limits as to St. Petersburg's appeal process (to the Board of Adjustment and the availability of common law certiorari from any denial thereof). Despite Granite State's failure to appeal the denials of its permit applications, the Court has found that Granite State has standing to assert a facial challenge to this portion of the ordinance, and like the permitting process, finds it lacking in procedural safeguards to protect against the undue discretion of a government official. Hence, for these reasons, the Court must necessarily find the ordinance unconstitutional.

B. Fifth Amendment Claim

Because the Court finds St. Petersburg's sign ordinance unconstitutional under its First Amendment analysis, it need not address Plaintiff s Fifth Amendment claim.

C. Damages

In light of its ruling herein, the Court finds that Plaintiff is not entitled to an award of damages in its facial overbreadth challenge to the ordinance. The Court is further persuaded by Defendants' argument that this case does not provide the required causal connection between the First Amendment violations and Granite State's injury.

III. CONCLUSION

It is therefore ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Partial Summary Judgment (Dkt. #22) is GRANTED in part and DENIED in part as set forth herein.

2. Plaintiffs Motion for Preliminary Injunction (Dkt. #24) is DENIED. For the reasons more fully set forth herein, the Court finds that Plaintiff has failed to establish the requisite elements for a preliminary injunction. See Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir.1999).

3. Defendants' Motion for Summary Judgment (Dkt. #43) is DENIED in part and GRANTED in part as set forth herein.

4. The City of St. Petersburg's sign ordinance is hereby declared unconstitutional for the reasons set forth herein.

5. The Clerk is directed to terminate all pending motions and close this case, entering judgment in favor

of Plaintiff. The Court does not find that this case merits an award of attorney's fees to either party under 42 U.S.C. § 1988.

DONE and ORDERED in Tampa, Florida on this 18th day of October, 2002.

JAMES S. MOODY, JR.
UNITED STATES DISTRIC JUDGE

FOOTNOTES

Fn 1 It is a violation to "install, create, erect or maintain" a sign inconsistent with the ordinance, or without a permit if one is required, to continue such a violation or fail to remove a violating sign. § 16-668(a)(1-4).

Fn 2 When Mayor Rick Baker took office on April 1, 2001, the sign ordinance at issue was already in effect.

Fn 3 Patricia Elston is the First Deputy/City Administrator of the City of St. Petersburg.

Fn 4 Renee Ruggiero is the Sign Examiner who reviewed Granite State's permit applications and authored the denial letter. (Dkt. 45, Exh. 5).

Fn 5 Defendants also argue that Granite State cannot establish standing because it has not engaged in, or attempted to engage in, any First Amendment speech because it has never "owned or operated a billboard or other sign displaying a message protected under the First Amendment." (Dkt. 44 at 12). The Supreme Court has recognized that individuals with a "commercial

interest" in speech may raise a facial challenge to an ordinance, raising the non-commercial speech interests of third parties. Metromedia Inc. v. City of San Diego, 453 U.S. 490, 504, n. 11. (1981). Although Defendants acknowledge this holding, they claim that because Granite State does not own or operate billboards, it does not have sufficient speech interest to confer standing. Clearly, parties with a commercial interest in speech may assert facial challenges to the First Amendment, in essence, filing suit on the grounds that there is an infringement of the rights of third parties as well as of their own free speech rights. See e.g., Metromedia, 453 U.S. at 504, n.11 ("we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment rights of others"); but see id. at 544-48 (Steven, J., dissenting) (no standing, even under the "limited exception" for overbreadth, for "hypothetical cases" of property owners not before the Court). See also Nat'l Advertising v. Ft. Lauderdale, 934 F. 2d 283, 285 (11th Cir.1991).

Fn 6 In Broadrick, which dealt with a statutory restriction on political speech activities of government employees, the Court first established limited exceptions to the strict standing test in cases involving "weighty countervailing policies." Id. at 611 (citations omitted). A facial overbreadth challenge is one such exception.

Fn 7 In Central Hudson, the Court struck down as unconstitutional a regulation of the New York Public Service Commission which completely banned promotional advertising by the utility. Central Hudson

Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Central Hudson established a four part test for determining the validity of government regulations on commercial speech. Id. at 463-64. The first element deals with the regulation of misleading or unlawful information. Id. The other elements of an otherwise valid restriction on protected commercial speech are: (1) it only seeks to implement a substantial government interest; (2) it directly advances that interest; and, (3) it reaches no further than necessary to accomplish the given objective. Id.; see also Metromedia, 453 U.S. at 490.

Fn 8 Freedman involved a content-based censorship scheme for motion pictures which required certain procedural safeguards to avoid constituting an invalid prior restraint: "(1) any restraint prior to judicial review can be imposed only for a brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden once in court." Freedman, 380 U.S. at 58-59; FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (limiting the third requirement); see also Thomas v. Chicago Park, 122 S. Ct. 775, 779 (2002).

Fn 9 Defendants acknowledge, as does this Court, that facial overbreadth challenges are permitted in some circumstances when a permitting scheme is deemed a "prior restraint" and fails to comply with the requirements of Freedman. See Redner, 29 F.3d at 1495; Artistic Entertainment, Inc. v. City of Warner Robins, 223 F.3d 1306 11th Cir. 2000 (adult business ordinance); U.S. v. Frandsen, 212 F.3 d 1231 (1

It' Cir. 2000) (park ordinance regarding assembly); see also Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761(11th Cir. 2000) (street closing and sound ordinance declared facially unconstitutional as "prior restraint"), judgment vacated, 122 S.Ct. 914 (Jan. 22, 2002) (remanded to reconsider in light of Thomas v. Chicago Park). For these requirements to apply, however, the permitting scheme must be a censorship scheme. See Thomas v. Chicago Park, 122 S.Ct. 775, 780 (2002) ("[w]e have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in Freedman.").

Fn 10 This argument is bolstered by Granite State's argument that the permitting process is intertwined with the sign ordinance, such that it may not be severed from the rest of the sign ordinance. Severability is discussed in detail infra.

Fn 11 This theory of categorizing an ordinance that provides for, in some cases, legally required exceptions, and in other cases, justifiable exceptions, as content-based first began with the Supreme Court's decision in Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), which held that the city's interest in maintaining stable and racially integrated neighborhoods was not sufficient to support a ban on residential "for sale" signs. Id. at 93.

Fn 12 In fact, the other dissenting opinions in Metromedia recognize San Diego's ordinance as viewpoint neutral such that the exceptions are rendered content neutral. Metromedia, 453 U.S. at 541-42, 554 (Stevens, J., dissenting in part); 565 (Burger, J., dissenting); 570 (Rehnquist, J., dissenting).

Fn 13 In Rappa, the Third Circuit attempted to deal with the issue of whether exemptions to a sign ordinance makes the ordinance unconstitutional. Rappa focused on the relationship between the content of a sign and its particular location or use. Rappa, 81 F.3d at 1065. The decision in Rappa took the position that due to the lack of agreement in reasoning, there was little discernable law on this issue from Metromedia. Id. at 1056-60. Although the ordinance was ultimately struck down, the Third Circuit recognized that the city's purpose in enacting a particular exemption is significant, especially as related to the governmental interest it was enacted to further. Id. at 1043, 1063 (finding that the exceptions are "quite small . . . not for particular subjects likely to generate much debate . . . and do not discriminate by viewpoint. Thus, they do not appear to be motivated by a desire to suppress certain speech. . . in a way that makes it likely that the government is aiming to shape the public agenda or is in fact significantly affecting the shape of that agenda."). See also Outdoor Media Dimensions Inc. v. State of Ore on, 945 P.2d 614, 622 (Or. 1997) (finding distinction between on-premises and off premises advertising is not content-based restriction).

Fn 14 See Freedman v. Maryland, 380 U.S. 51 (1965) (striking down a state motion picture censorship statue as unconstitutional which required theater to submit film to state board of censors before exhibiting it).

Fn 15 One commentator concluded that Taxpayers for St. Vincent "impliedly overruled" the content-based discrimination theory from Metromedia, emphasizing the need for "viewpoint rather than content neutrality." Gerard, Jules, B., "Evolving Voices in Land Use Law:

Election Signs and Time Limits," 3 Wash. U.J.L. & Pol. 379, 383 (2000). He noted that the ordinance at issue in Taxpayers for St. Vincent contained a "host of specific exemptions that were similarly identical to those that have proved fatal to the San Diego ordinance in Metromedia. The Vincent court simply ignored them." Id.

Fn 16 The Supreme Court noted that "[u]nder the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'contentbased.'" Id. These troubling words seem to invite the type of automatic or per se strict scrutiny analysis that makes regulating signs a risky business. Yet, the Supreme Court continues, "[i]t is the absence of a neutral justifcation for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral." Id. at 429-30 (emphasis added). Also, as discussed in greater detail infra, the Supreme Court has approved other ordinances with exemptions that arguably fit this analysis, such as the one in Thomas v. Chicago Park Distr., 122 S. Ct. 775 (2002).

Fn 17 The facts reveal that the ordinance was not a reasonable fit for the government's interest in promoting aesthetics (or preventing "visual blight" caused by littering) since the reduction in the overall number of newsracks would be "minute" or "paltry" - only 62 out of a total of 1500-2000. Discovery Network, 507 U.S. at 417-18.

Fn 18 The Court did not find the fact that the government "may" deny the permit rather than "must" do so allows them to impermissibly waive the permit requirements for some "favored speakers" while insisting upon them for others, which would clearly constitute unconstitutional conduct. Id. at 781 ("[t]hat is certainly not the intent of the ordinance" as the government has "reasonably interpreted" it to "permit overlooking only those inadequacies that [] do no harm to the policies furthered by the application requirements"). The Court cautioned that if and when a situation of "unlawful favoritism" were to occur, such an abuse "would be dealt with," rather than "insisting upon a degree of rigidity that is found in few legal arrangements." Id.

Fn 19 As set forth, supra, Freedman involved a content-based censorship scheme which required certain procedural safeguards: "(1) any restraint prior to judicial review can be imposed only for a brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden once in court." Freedman, 380 U.S. at 58-59. See also FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990); Thomas, 122 S. Ct. at 779.

Fn 20 Defendants attach a portion of the transcript from the oral arguments before the Supreme Court wherein Chief Justice Rehnquist distinguished the case from Freedman on the grounds that Freedman required "prior submission of speech" to a Board of Censors that was "explicitly concerned with the content of speech." Dkt. 44 at 15.

Fn 21 Of course, if a content-based regulation were to withstand strict scrutiny, it would not be impermissible. See Burson v. Freeman, 504 U.S. 191 (1992) ("it is the rare case in which we have held that a law survives strict scrutiny"). See also Am. Lib r Assn v, United States, 201 F.Supp.2d 401 (E.D. Pa. 2002) (statute requiring filtering of Internet at libraries cannot withstand strict scrutiny because the use of filters is not narrowly tailored to further government's legitimate interests).

Fn 22 Even differentiations previously approved could be considered "content-based" as they fit within the troubling distinction made in Discovery Network. See Messer, 975 F.2d at 1509 (onpremise and off premise distinction); Outdoor Systems, Inc. v. City of Mesa, 997 F. 2d 604, 613 (9th Cir. 1993) (same).

Fn 23 Granite State contends that St. Petersburg's ordinance contains "too many content-based distinctions to discuss in detail" -- and cites to more than 50 different provisions of the ordinance. See Dkt. 54, p.11, n.6. The Court discusses many of these provisions in more detail infra; however, the Court also finds that many of them are de minimus exceptions such as warning signs or garage/yard sale signs; or legally required or justifiable exceptions such as real estate or construction signs; or others are simply not content based such as pavement markings or signs attached to vehicles. The Court disagrees with Granite State that this list of exceptions renders the ordinance unconstitutional per se.

Fn 24 Conversely, an on-premise sign is one "which identifies a use, business, or advertises a product for

sale or service to be rendered on the zone lot where the sign is located." § 16-666(16).

Fn 25 Except on lots "where a principle residential use exists," the area shall not exceed 25% of the window pane area, with the total area of all signs on the lot not to exceed 10 square feet. § 16670(a)(14). The signs must be free speech signs.

Fn 26 This category is defined as "signs protecting residents First Amendment right to free speech in order to express any lawful non-commercial message" and may not contain any commercial message. §16-666. One "free speech" is allowed on "any lot where a principal residential use exists." §16-670(a)(19). These signs may not be in "rights-of-way" or in the "visibility triangle" and may not exceed four square feet and eight feet in height. Id.

Fn 27 An exempt sign is defined by the ordinance as "any sign for which a permit is not required, but which must, nonetheless, conform to the other terms and conditions of this article." § 16-666(9).

Fn 28 Public/semipublic is defined as including signs "erected on-site for a nonprofit or quasipublic use such as a library, school, church, hospital, or government owned building. In addition, Public/semipublic is a major Future Land Use Plan classification which includes the following Plan categories: Preservation, recreation/open space, institutional, and transportation/utility. The characteristics of these categories shall be used in determining whether or not a use is public/semipublic." §16-666(21).

Fn 29 The term "directional sign" is defined as "any sign which exclusively contains information providing direction or location of any object, place, or area including but not limited to, a sign indicating an avenue of ingress or egress." § 16-666(8).

Fn 30 These criteria are as follows: (1) accurate site plan, (2) location of structures on site, (3) computation of total area, height and number of signs, (4) location of present and future signs, (5) drawings of the signs, (6) names and addresses of those erecting the signs, (7) written consent to the applicant from owner for sign, and (8) other information regarding compliance with city laws. § 16692(e)(1-8).

Fn 31 The Court makes no factual finding that 17 days is per se a reasonable or unreasonable time period. Such a finding is unnecessary in light of the lack of time limits in the ordinance.

Fn 32 Even if this Court were to consider the Defendant Baker's change in policy to add time limits, which it does not because it is undisputed that this policy was not in effect at the time of Granite State's applications, it is not convinced that such a policy or "goal" is sufficient. See Baker Aff., ¶8 and attachments. For example, there is no additional information in the record on what occurs if this "goal" is not met or what specific recourse a permit applicant may take.

Case No. 8:01-cv-2250-T-30MSS

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GRANITE STATE OUTDOOR ADVERTISING, INC.,
Plaintiff(s),

v.

CITY OF ST. PETERSBURG, FLORIDA; RICK BAKER; and TISH ELSTON,
Defendant(s).

October 18, 2002

JUDGMENT INA CIVIL CASE

☐ Jury Verdict. This action came before the court for trial by jury. The issues have been tried and the jury has rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED; that judgment is entered in favor of the plaintiff.

October 21, 2002
SHERYL L. LOESCH, CLERK

BY: Deputy Clerk

Supreme Court, U.S.
FILED
MAY 4 - 2004
OFFICE OF THE CLERK

(2)

No. 03-1386

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ST. PETERSBURG, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondent objects to the Petitioner's statement of the Questions Presented as being a misstatement of the holding of the Eleventh Circuit Court of Appeals, and suggests that the Questions Presented are more fairly restated as follows:

> Did the Eleventh Circuit, after deciding that the City's sign ordinance is a content-neutral regulation of sign structures and that the ordinance contains adequate safeguards to guide official decisionmaking, correctly hold that express time limits for the processing of permit applications are not required?

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STATEMENT OF THE CASE

A. Facts

An ordinance of the City of St. Petersburg, Florida (the "City") regulates the size, location, and number of sign structures within the city limits. The ordinance was enacted to promote uniformity, preserve aesthetics, and foster safety. App. to Petition, 6a.

Both the district court and the Eleventh Circuit found that the ordinance contains criteria to be used by the City in deciding whether to issue a permit for an off-premise sign structure. The criteria include the height and area of the structure, separation distances between structures, and setback requirements. The criteria also include the zoning of the lot, whether there are other structures on the lot, and whether there is already an off-premise sign on the lot. App. to Petition, 2a-3a. Both courts found that the criteria are specific, objective and narrowly tailored, and that an application may be denied only upon the basis of the specified size, location, and number criteria. App. to Petition, 7a & n.4; 40a, 49a. A sign's message is not one of the criteria.

This controversy began when Granite State Outdoor Advertising ("Granite") filed six applications for permits to erect billboards within the City. Granite complains that the sign ordinance does not require the City to make a decision on an application to post a sign. Petition, 3. However, the City denied all of the sign permit applications seventeen days after they were filed. The applications were denied because other structures already existed on the lots, and because Granite failed to demonstrate compliance with the height, separation, and distance requirements. One application was

for a lot zoned residential multifamily. Another failed to demonstrate it met the minimum footage requirement. App. to Petition, 3a.

Without attempting to seek administrative review of the denials, Granite filed suit claiming that the sign ordinance was unconstitutional on its face and as applied. App. to Petition, 3a, 19a.

Granite refers to the sign ordinance as a "speech permitting scheme" and asserts that "no speech can go forward absent permission." Petition, 5, 8. These are misleading representations. As the district court found, the ordinance on its face is a content-neutral regulation of sign structures, not an impermissible restriction of speech based on content. The uncontroverted evidence of the City's sign examiner is that she never makes a decision on the basis of the viewpoint of the message. Granite's applications were denied for reasons unrelated to the message. App. to Petition, 38a-40a. For those reasons, the Eleventh Circuit agreed that the ordinance is content neutral. App. to Petition, 6a-7a.

Remarkably, none of the decisions alleged to be in conflict with the decision below relate to sign structures or the enforcement of sign ordinances, with the exception of a decision of the Eleventh Circuit Court of Appeals brought by the same plaintiff against the City of Clearwater, Florida. In that case, as in the case below, Granite was unsuccessful.

B. Procedural History

Granite's statement of the proceedings below (Petition, 3) is both argumentative and incorrect. The City adopts the summary of the procedural history of this case as set forth by the Eleventh Circuit Court of Appeals. App. to Petition, 3a.

Granite states that the Eleventh Circuit held that "the fact that there were *no procedural safeguards* constraining the processing of sign applications by City officials was not a defect in the ordinance." Petition, 4 (italics added). This is not merely incorrect; it is the cracked foundation from which the entirety of Granite's argument falls.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a relevant decision of this Court or any decision of any Court of Appeals, and does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10.

The decision does not conflict with decisions of this Court.

The decision of the Eleventh Circuit is limited to the threshold issues of whether the City's sign ordinance regulates structures, not speech, in a content-neutral manner, and whether the ordinance contains adequate standards to guide official decisionmaking. After deciding the threshold issues in the affirmative, the principal issue became whether express time limits for the processing of permit applications are required. The court answered this question in the negative.

Granite appears to focus its attention only upon the principal issue. Granite misstates the decision below in two respects. Granite asserts that the ordinance regulates "speech" or "speech activities," contrary to the decision of the court. Granite also asserts that the Eleventh Circuit has approved an ordinance which does not include any procedural

safeguards whatsoever. Granite does not attempt to explain why the court was wrong in deciding that the ordinance regulates sign structures or in deciding that the ordinance contains adequate safeguards to guide decisionmaking. Accordingly, the issue for consideration here is limited to whether the Eleventh Circuit's decision that the ordinance need not contain express time limits for the processing of permit applications is in conflict with decisions of this Court or other Courts of Appeal.

The three decisions of this Court alleged by Granite to be in conflict with the decision below are distinguishable on the basis of their facts and the First Amendment analysis appropriate to each case.

The historic background for these three decisions is *Freedman v. Maryland*, 380 U.S. 51 (1965), where motion pictures were subject to prior approval by a state board of censors having the power to prohibit the showing of films judged by the board to be obscene or tending to debase or corrupt morals or incite to crimes. In striking down the statute, this Court imposed three procedural requirements upon a censorship scheme: (1) Any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) a prompt final judicial review of that decision must be assured; and (3) the censor must bear the burden of going to court to suppress the speech and bear the burden of proof once in court. *Freedman*, 380 U.S. at 58-59.

The decision below and the allegedly conflicting post-*Freedman* cases arose from substantially different factual situations but have a common theme. In each case, the outcome depends upon whether and to what extent the

government is attempting to abridge the freedom of speech contrary to the First Amendment and, if so, whether the procedural requirements of *Freedman* are required or, as a minimum, whether other safeguards are required to limit the exercise of discretion by government officials.

In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), this Court declared invalid a statute licensing professional solicitors of charitable contributions. The statute had three deficiencies, of which only one is relevant to this case. The statute effectively required a "license to speak." The licensing requirement was an improper prior restraint upon speech because, contrary to *Freedman*, *supra*, the statute failed to require the licensor to issue a license or go to court within a specified brief period, and improperly permitted a delay without limit.

In *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), this Court examined an ordinance regulating sexually oriented businesses. The ordinance targeted businesses purveying sexually explicit speech having First Amendment protection, and was more onerous with respect to sexually oriented businesses. The ordinance did not set a time limit within which the licensing authority must act, and did not provide for prompt judicial review. The ordinance vested unbridled discretion in the chief of police. This Court concluded that the licensing scheme was a prior restraint that lacked adequate procedural safeguards. *Id.* at 223. Although the ordinance did not present the "grave dangers of a censorship system," *id.* at 228, the ordinance failed to provide the first two of the safeguards of *Freedman*, *supra*, and was therefore invalid.

In *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), this Court considered the validity of an ordinance requiring permits prior to conducting any large-scale event in a public park. The challenge was brought by persons wishing to hold rallies advocating the legalization of marijuana. This Court found that the ordinance regulated the time, place, and manner of the use of a public forum in a content-neutral manner, and in a unanimous decision held that the procedural requirements of *Freedman* did not apply. A content-neutral ordinance regulating speech in a public forum, limited by its terms to considerations of public safety and the like, differs totally and utterly from an ordinance which gives an official the authority to censor the content of a speech. *Id.* at 322-23. This Court expressly distinguished the case from *FW/PBS*, *supra*. *Id.* at 323, n.2. This Court did not merely exempt the Chicago Park District ordinance from the third of the *Freedman* requirements nor did this Court require compliance with a time schedule for decisions to be made on applications for permits, as Granite argues. Petition, 6-7. A mandatory time limit is one of the *Freedman* requirements. This Court, without dissent, held that the procedural requirements of *Freedman* did not apply. *Thomas*, 534 U.S. at 322-23, 325.

But that was not the end of the matter:

> Of course, even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. [Citation omitted.] We have thus required that a time, place, and manner

> regulation contain *adequate safeguards to guide the official's decision* and render it subject to effective judicial review [Citation omitted.] . . . (Italics added.)

Thomas, 534 U.S. at 323. The park district's ordinance passed that test because a permit could be denied only for one or more of the reasons specified in the ordinance, and the grounds were reasonably specific and objective. *Id.* at 324.

A clear pattern emerges from this trilogy of cases. If a licensing scheme regulates protected expression based on content, or operates as a prior restraint on protected expression, then the first two if not all three of the *Freedman* requirements apply; *FW/PBS* and *Riley*, *supra*. If a licensing scheme is a content-neutral time, place, and manner regulation of expression and does not operate as a prior restraint on protected expression, the procedural requirements of *Freedman* do not apply; *Thomas*, *supra*. In all cases where the government regulates protected expression, there must be safeguards adequate to protect against the exercise of unbridled discretion on the part of the official having authority to issue licenses.

The decision below is not in conflict with *Thomas*, *FW/PBS*, or *Riley*. First and foremost, unlike the case below, these decisions do not relate to sign structures or the enforcement of sign ordinances. They relate to regulating expression in the context of regulating the use of a public park, as in *Thomas*; sexually oriented businesses, as in *FW/PBS*; or charitable solicitations, as in *Riley*. In the case below, the City's sign ordinance regulates the size, location, and number of sign structures in a content-neutral manner without restricting expression on the basis of content.

The difference between sign structures and expressions that may appear on sign structures is not a matter of semantics. By analogy, a local government has a legitimate public interest in assuring that a new building meets applicable zoning, building, and life safety code requirements, which ordinarily generate no First Amendment issues. If the building someday houses a sexually oriented business, the government might have an entirely different sort of interest reflected in a different sort of ordinance. Regulating protected expressive activities within the building would be subject to higher standards, and four of the cases cited by Granite are examples of such cases. But, the patrons and employees of the business should enjoy the reasonable expectation that the building was constructed according to code.

For the sake of argument, if the City's sign ordinance regulates speech (a proposal with which the City does not agree), the first issue is whether the ordinance is content-neutral or operates as a prior restraint on protected expression. The sign ordinance regulates the size, location, and number of sign structures and is not a content-based restraint on speech. There is virtually no risk that the City's sign permit official will favor or disfavor speech based on its content when examining plans for a sign structure. Accordingly, the procedural requirements of *Freedman* do not apply. *Thomas*, *supra*.

Thomas and the decision below are not in conflict. In both cases, the ordinance requires content-neutral licensing which is not subject-matter censorship. In both cases, the ordinance contains specific criteria for making decisions upon applications, and a denial must be based upon one or more of the criteria. In both cases, none of the grounds for denying a permit has anything to do with what a speaker might say or what a sign placed upon a billboard structure might say.

FW/PBS and the decision below are not in conflict. The Dallas ordinance operated as a prior restraint on protected expression because it targeted businesses purveying sexually explicit speech. Accordingly, this Court declared the ordinance invalid for failing to provide the first two of the procedural safeguards of *Freedman*. In the case below, the City's ordinance is content neutral and does not operate as a prior restraint on protected expression. The ordinance regulates sign structures and furthers legitimate objectives unrelated to expressions or viewpoints that may appear on such sign structures.

Riley and the decision below are not in conflict. The deficiencies of the charitable solicitation statute are not shared by the City's sign ordinance. The charitable solicitations statute was found to be a prior restraint on speech, subject to the procedural requirements of *Freedman*. The City's sign ordinance regulates sign structures, not sign messages, and is not a content-based prior restraint on speech. Accordingly, as in *Thomas*, the procedural requirements of *Freedman* are not applicable.

The decision does not conflict with a decision of any Court of Appeals.

The decisions from other circuits allegedly in conflict adhere to the same pattern discussed above with some variations. The variations derive from the unique facts of each case. The decisions are not in conflict.

Granite alleges broadly that the decisions are in conflict with the decision below, but the gist of the argument is that the other courts have "made the same mistake as the *Granite* panel . . . by misreading *Thomas* to remove all safeguards

from content-neutral speech restrictions" or "to have done away with safeguard requirements for content-neutral speech permitting scheme." Petition, 12-13. No court has removed "all" safeguards. Granite does not explain how the decisions are in conflict if all of the courts have made the same "mistake."

In *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002), students unsuccessfully challenged a mandatory student activity fee as being not content-neutral and subject to unbridled discretion in the allocation of funds among student organizations.

Earlier, this Court acknowledged that college students cannot be required to pay subsidies for "extracurricular student speech" of other students unless the program is "viewpoint neutral." *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 221 (2000). In reaching its decision, this Court did not discuss *Freedman*.

Following remand, the district court determined that the decision-maker had been granted too much discretion. Subsequently, the Seventh Circuit found that the university fee system set forth specific, detailed, narrowly drawn and reasonable standards guiding the discretionary decisions to allocate the funds, and upheld the system with one limited exception not relevant here.

In *Southworth*, as in the case below, the courts required adequate safeguards to protect against the exercise of unbridled discretion.

The decision below does not conflict with *Encore Videos v. San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 466 (2003), and the Fifth Circuit certainly did not remove all safeguards. In that case, a San Antonio ordinance prohibited the location of sexually oriented businesses within 1,000 feet of residential areas. The ordinance was invalid as applied to businesses selling adult materials only for home viewing, but was otherwise valid. As a licensing ordinance regulating protected expression, the court determined that the ordinance possessed the two "essential" safeguards required by *FW/PBS*. The ordinance passed both of those tests because a license could be denied only on the basis of distance, a decision on a license application was required within 30 days, and the ordinance provided for prompt access to judicial review.

The Fifth Circuit found a clear distinction between adult business licensing ordinances and a permit system regulating the use of public parks. Because of the differences in subject matter, the relevance of *FW/PBS* was deemed unaffected by *Thomas*. *Encore Videos*, 330 F.3d at 296, n.12.

Likewise, *Encore Videos* is distinguishable from the case below. The City's sign ordinance is not a licensing scheme regulating adult businesses or having the effect of operating as a prior restraint on protected speech, but instead regulates the size, location, and number of sign structures in a content-neutral manner, and the procedural requirements of *Freedman* and *FW/PBS* do not apply.

The decision below does not conflict with *Z. J. Gifts D-4 v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), *cert. granted*, No. 02-1609, 124 S. Ct. 383 (Oct. 14, 2003). In that case, as in other cases arising from ordinances

governing the licensing of sexually oriented businesses, portions of the ordinance were declared invalid because the ordinance did not include the safeguards of specifying a time limit within which the city must act or guaranteeing a prompt judicial decision on the merits when an adult business challenges a license denial.

Littleton is not in conflict with the decision below, and the court did not remove all safeguards for "speech permitting schemes." Ordinances regulating adult business establishments are treated as prior restraints on businesses that sell materials presumptively protected by the First Amendment. Such ordinances are distinguishable from ordinances which regulate the size, location, and number of sign structures in a content-neutral manner without restricting speech.

There is no conflict between the decision below and *Fly Fish v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003), where the ordinance prohibited totally nude dancing in adult entertainment establishments. On the relevant issue of the validity of the licensing process, the ordinance required an adult entertainment license to be issued within 30 days if the city did not act on the application. If the city did not formally deny an application within 30 days, the ordinance permitted an adult entertainment establishment to remain open on a "temporary" license, conditioned on the ultimate licensing decision of the city. The court found that the failure of the city to act upon an application within a prescribed time period operated as an improper prior restraint upon protected expression. *Thomas* did not alter the procedural requirements applicable to licensing provisions targeting adult entertainment establishments. *Fly Fish*, 337 F.3d. at 1313, n.25.

Fly Fish is easily distinguishable from the case below, and the court cannot be accused of having removed all of the safeguard requirements for "speech permitting schemes."

Granite mistakenly argues that the Courts of Appeals for the Federal Circuit and the First and Eleventh Circuits have read *Thomas* as having "done away" with safeguard requirements for content-neutral speech permitting schemes, citing *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002), and *Granite State Outdoor Advertising v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003). Petition, at 13.

In *Griffin*, *supra*, the petitioner unsuccessfully sought to display the Confederate flag at a national cemetery where Confederate soldiers are buried. The court ruled that decisions by the Department of Veterans Affairs to permit or deny exceptions to its ban on unauthorized demonstrations are not subject to the procedural safeguards requirements applicable to explicit censorship schemes restricting expression in public fora. National cemeteries are not public fora, and they serve particular commemorative and expressive roles. Where the government uses a nonpublic forum for its own expressive purposes, the government has greater discretion to decide what speech is permissible than in other fora serving no such purposes. *Griffin*, 288 F.3d at 1324.

Griffin is plainly distinguishable from all other cases cited by Granite in all respects. The court did not "[do] away" with safeguard requirements for "speech permitting schemes;" the court instead applied standards applicable to government-owned nonpublic fora which serve unique commemorative roles.

In *New England Regional Council of Carpenters, supra*, the issues were whether a state agency may ban leafletting on Boston's Fish Pier, a multipurpose pier that the agency controls, and whether the agency may require a person seeking to distribute handbills on public sidewalks controlled by the agency to apply in advance for a permit. The pier is a non-public forum and the leafletting ban was a valid exercise of governmental authority; the sidewalk is a traditional public forum but the permit requirement was valid on its face. *Id.* at 14, 25.

Examining the permit requirement in light of *Thomas, supra*, the court questioned whether the regulations (1) possessed adequate standards to guide the exercise of official discretion and (2) were narrowly tailored to a significant state interest while leaving open satisfactory alternative means of communication. *New England Regional Council*, 284 F.3d at 25. The court upheld the regulations as valid content-neutral time, place, and manner restrictions.

In *Granite v. City of Clearwater, supra*, an action challenging the City of Clearwater's sign ordinance, the Eleventh Circuit decided that Granite had standing to challenge only that part of Clearwater's ordinance limiting the area and height of a freestanding sign, but did not have standing to challenge the provisions establishing the city's permitting and appeals processes. Regarding the area and height limitations, Clearwater's ordinance did not vest the decision-maker with unbridled discretion. Regarding the absence of time limits, the court stated that time limits are required when their lack could result in censorship of certain viewpoints or ideas but are not categorically required when the permitting scheme is content-neutral; *Clearwater*, 351 F.3d. at 118. Granite did not show how it was harmed by

an absence of time limits in the permitting process; in fact, the permits were denied the same day they were received.

In none of these cases have the courts "done away with" adequate safeguards when the government seeks to license or regulate protected expression. None of the decisions examine ordinances regulating sign structures without regard to message content with the exception of *Clearwater*, *supra*. In the *Clearwater* decision, the court correctly observed that Granite had no standing to challenge the city's permitting and appeals processes. In neither *Clearwater* nor the case below could Granite show how it was harmed by an absence of time limits in the permitting process, or how a lack of time limits could result in censorship of viewpoints or ideas.

Granite cites decisions by district courts which are "divided on the issue." Petition, 14. n.2. The first of the cited decisions, *Diener v. Reed*, 232 F. Supp.2d 362 (M.D. Penn. 2002), was a disorderly conduct case. That decision has been affirmed on appeal in an unpublished opinion; *Diener v. Reed*, No. 03-1405, 77 Fed. Appx. 601, 2003 U.S. App. LEXIS 20811 (3d Cir. September 19, 2003). Such decisions are outside the proper scope of the Petition.

CONCLUSION

For the foregoing reasons, Respondent, City of St. Petersburg, Florida, asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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(3)

MAY 28 2004

No. 03-1386

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,
PETITIONER

v.

CITY OF ST. PETERSBURG, FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

To its credit, Respondent City of St. Petersburg has not shied from the issue at hand. The parties agree that the question posed by the decision in *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg* is whether or not the Court's unanimous decision in *Thomas v. Chicago Park District* exempted content-neutral time, place, and manner restrictions on speech from compliance with any of the procedural safeguards mandated in *Freedman v. Maryland.* Petitioner Granite State has argued that the holding of *Thomas* was limited to ordinances regulating the use of public facilities and that the Court clearly did not intend to overturn the holding of decisions such as *Riley v. National Federation of the Blind* that even restrictions that can be labeled content-neutral time, place, and manner restrictions must include time limits on the permitting process. The City argues that *Thomas* freed governments from adhering to procedural safeguards for all content-neutral speech regulations and, therefore, overturned *Riley* and other decisions. The Eleventh Circuit Court of Appeals has adopted and reaffirmed this position and so have at least two other circuit courts. Granite State has shown in its initial Brief and herein that this interpretation is not tenable in light of the jurisprudence of procedural safeguards that has developed since 1965. Granite State's Petition should be granted to prevent a gross and unwarranted increase in the government's power to control speech.

I. The Risk of Abuse of Power by Governmental Officials that Necessitates Procedural Safeguards Is Present Even In Content-Neutral Regulations.

Procedural safeguards have been constitutionally mandated first and foremost because government officials should not be afforded the authority to improperly delay speech activity. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Because many commercial and noncommercial messages are only relevant for a short period of time, such as during a sale or an election cycle, delay of speech activity is often tantamount to denial of the speech altogether. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988) (acknowledging that "delay compels the speaker's silence"). "Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The power to delay speech must be sharply limited. As such, prior restraints of speech activity, when allowed at all, should only be allowed for a short and definite period of time. *E.g.*, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990).

In the realm of sign regulations, the risk of delay is readily apparent. For example, a city sign ordinance could require, as most do, that a permit be obtained before a sign is posted. Even if the ordinance allows no consideration of the content of the proposed sign, if city officials are allowed to hold applications for weeks, months, or indefinitely, they are afforded an improper degree of control over speech. Decision-making in regard to applications will undoubtedly be impacted by

the character of the applicant. Although the Chamber of Commerce's application for a 32 square foot temporary sign is approved immediately, a substantively-identical application submitted by a youth wearing a pro-marijuana tee-shirt might be delayed for several weeks. Although Wal-Mart's sign application is handled promptly, the adult bookstore's application may languish for months. Without a definite time limit on permitting, city officials have unlimited power to restrain speech on signs for any reason they choose. As this Court has previously recognized, the constitutional basis for requiring procedural safeguards is not dependent on the content-based nature of the regulation.

Even ordinances with definite time limits can be unconstitutional. For example, if a city imposed a review process whereby all sign applications are considered by various city departments over a six-month period and then granted or denied, the process would be unconstitutional. Whether or not content was a consideration for the officials is irrelevant because speech is restrained for a period of time that cannot be deemed "brief." *FW/PBS*, 493 U.S. at 228 (recognizing that "any restraint prior to judicial review can be imposed only for a specified brief period"). Thus, ordinances can be wholly content-neutral but still afford government officials too much discretion to delay speech activity. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992) (reiterating that whether a content-neutral "ordinance delegates overly broad discretion to the decisionmaker [depends] not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from

doing so"). Without requiring brief, specified time limits to constrain government officials' deliberations, nothing prevents them from arbitrarily delaying or suppressing a permit applicant's speech rights.

II. Whether "Signs" or "Sign Structures" are Regulated by the Sign Ordinance Makes No Difference to the Constitutional Analysis.

The City attempts to argue that because its Sign Ordinance "regulates structures, not speech" there is no need for procedural safeguards. Brief in Opposition, p. 3.[1] As this Court has often acknowledged, however, control of the medium of speech is control of the speech itself. For example, the regulation of newsracks, cable television wires, and adult entertainment establishments is subject to constitutional protections. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415 (1993) (newsracks entitled to First Amendment protection as the "manner" in which speech is distributed); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) (recognizing regulations on cable television subject to First Amendment protections); *FW/PBS*, 493 U.S. 215, 224 (1990) (acknowledging that adult bookstores, adult theaters, and adult cabarets entitled to First Amendment protections). Signs are, of course, an even more

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[1] A brief evaluation of the Sign Ordinance shows that it most definitely did regulate speech by including dozens of categories of signs that were distinguishable based only upon the content of the message conveyed thereon. (2a, 16a). Nevertheless, if a regulation prevents posting a sign without a permit – even if it regulates only physical characteristics of signs – it must include temporal limitations on the permitting process.

fundamental medium of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55 (1994). The City requires a permit before a sign can be posted in the ground, on a building, or in a window. The only type of sign exempt from regulation with the exception of several content-based categories, (16a), would arguably be signs held aloft by a person without any need for a "sign structure." The Court has recognized that such ineffective means of communication are not legitimate alternatives to the use of traditional signs. *Ladue*, 512 U.S. at 57-58.

The City has conceded that it "regulates the size, location, and number" of signs. *Id.* at 7, 8. The City harps on the distinction between regulating signs and sign structures without describing how this distinction makes any difference from a constitutional perspective. Any person or entity seeking to post a sign in the City, must first obtain permission from City officials. The City acknowledges the risk that its officials could "favor or disfavor speech" but argues that such a risk is slight. *Id.* at 8. Even a slight risk is unacceptable, however, when it can be so easily prevented by adherence to this Court's directives that have been in place since the *Freedman* decision was issued in 1965. Sign applicants simply should not be subject to potentially endless delays.

CONCLUSION

City officials in St. Petersburg, Florida must give their stamp of approval before the vast bulk of signs can be posted. This restraint is imposed on individuals and organizations seeking to post signs on their own property as well as those endeavoring to

place a sign on publicly-owned land. This restraint applies to signs conveying either commercial or noncommercial messages. It is undisputed that City officials can take as long as they like to decide whether to grant or deny sign applications. (3a). The City and two circuit courts of appeal have concluded that the decision in *Thomas v. Chicago Park District* has freed government officials from time constraints on speech permitting whenever it can be argued that the restriction is content-neutral. The decision in *Granite State v. St. Petersburg* threatens to thoroughly undermine the purpose of procedural safeguards. Speech can and will be delayed with impunity by government officials. The holding in *St. Petersburg* would, of course, apply with equal force to the permitting of many other speech activities, such as parades, festivals, soliciting, leafleting, newspaper distribution, adult entertainment, and any other activity that is arguably regulated in a content-neutral fashion. Granite State's Petition should be granted to prevent further damage to free speech activities that will unquestionably result from the Eleventh Circuit's *Granite State v. St. Petersburg* decision.

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